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INTRODUCTION TO THE CIVILIZATION OF INDIA
LEGAL MATERIALS FOR THE STUDY OF MAODERN INDIA

COMPILED AND EDITED BY

MARC GALANTER

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THE UNIVERSITY OF CHICAGO

The College

Introduction to the Civilization of India

LEGAL MATERIALS FOR THE STUDY OF MODERN INDIA

Compiled and edited by

(Marc Galanter

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PREFACE

Over a century ago, Sir Erskine Perry, upon his retirement as Chief Justice of the Supreme Court at Bombay, compiled a volume of "Cases Illustrative of Oriental Life and the Application of English Law to India. . . ." Like Perry's Oriental Cases, as it came to be known, the present materials were assembled on the assumption that a collection of legal materials might provide a unique and useful perspective on Indian society. I hope that this collection will be of use not only to lawyers seeking acquaintance with Indian law but also to students of India innocent of law, to whom it may reveal some aspects of Indian society that are otherwise obscure.

The present collection consists largely of reports of cases decided by various Indian courts. These reports may be read in several different ways. First, they provide revealing glimpses of Indian life at points where disputes have led to the intervention of officials--or to an attempt to invoke official intervention. These glimpses are no doubt fragmentary, distorted and to some extent unrepresentative. But they have the advantages of being hard, documented accounts written by participants who bore responsibility and exercise professional skill. The reports themselves are episodic; continuity is on the level of legal doctrine rather than narrative history. In selecting cases, I have had to balance my desire for richness of detail against the demands of brevity. I hope that the resulting selections manage to suggest the richness of the material that awaits the social analyst in the legal literature.

Second, we get a more direct and distinct picture of what might be called the Indian legal culture. We see judges (and, in the background, lawyers) at work, fashioning general rules and applying them to a variety of local situations. In a village study, we observe the incidence of national (or regional) policy from the local vantage point. Here, we look from the top down and see officials accommodating the national standards to a multiplicity of local situations. These decisions are neither completely determinate nor entirely capricious. They are not mechanical applications of pre-existing formulae; nor are they to be explained away by some reductionist formula. Rather they are the product of a complex and variegated (and changing) tradition of legal work. The present collection is presented with the hope of encouraging the reader to look beneath the surface of the cases without seeing all the way through to the other side.

Third, we may observe the development of various legal doctrines. We see the courts fashioning doctrines in response to pervasive and persistent problems which are basic to the formation of modern Indian society and polity. Out of diverse materials of British, Hindu, Muslim and customary law (and more recently, the Indian Constitution), there has been fashioned a unique system of law which is an integral part of modern India. The formation of such a modern legal system and the problems that it addresses are not peculiar to India. Similar processes and problems may be discerned not only in other new nations, but in the industrialized nations of the West. It is to be hoped that an understanding of the Indian experience may provide insight into general problems of legal development.



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The general plan here has been to proceed in roughly chronological order. The cases are arranged in three groups. Part I concerns the legal treatment of traditional social relations before the consolidation of the modern legal system. Part II narrows down the focus to the institution of caste during the period from the consolidation of the modern legal system to independence. Part III deals with the new dispensation under the Constitution and broadens out to consider not only caste but also religion and hereditary rights. The Introduction and the attached essay will, it is hoped, serve to put the case material in a broader context. It must be admitted that there is little here on many branches of Indian law; the collection is unrepresentative of India as a whole; for the most part urban, industrial India does not make an appearance. But on the whole I think that the collection is broad and varied enough to give the reader some feeling for the operation of the whole legal system—at least so much of it as can be discerned through the lens of appellate decisions.

This collection in its present form is meant to serve several purposes. It is designed primarily for use in the University of Chicago's interdisciplinary course, Introduction to the Civilization of India. I also hope to use it as a core of case material for a course on Modern Indian Law. And, finally, I expect to use Part III in a course on Religion and the State—a fact which accounts for the disconcertingly heavy emphasis on religion in Part III. Because of the different audiences which are anticipated, I have put in some notes which may be unnecessary for some or most readers. I must also apologize for the extensive paraphrases in Part I, an expedient which was rendered necessary by the unavailability of some books. I hope that in a subsequent edition these can be replaced by the original reports.

This is, of course, a very tentative edition. It was put together on short notice (or sudden inspiration) and was only possible because of the helpful cooperation of Mr. Harold Levy and the devoted and immensely competent assistance of Miss Judith Franke. I am indebted to J. D. M. Derrett for a number of valuable comments on an earlier version of the Introduction.

This is a trial run. I hope that a subsequent edition would provide room to treat more topics, including Muslim law, Hindu family law and the relation of customary law to sacred texts. I would appreciate hearing from readers any comments, suggestions, corrections, etc. I would like to know what other kinds of explanatory or descriptive material should be included to make such a volume more useful for various purposes.

Marc Galanter

Chicago, 1965

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INTRODUCTION

The Uses of Law in Indian Studies

Marc Galanter

....the true revolutionary agent in India has been neither the Executive Government nor the Legislature, but the Courts of Justice....

Sir Henry Maine, Village Communities 300

The attempt to use law as a path to the understanding of modern India may encounter scepticism deriving from several quarters. Before proceeding to examine the possible significance of legal studies, I shall attempt to state (and label) these objections--which derive, in turn, from the nature of legal materials, from their relation to society and from the peculiar features of Indian law. First, legal materials are normative rather than descriptive. They are so immersed in technicalities and at the same time so given to rhetorical idealizations as to obscure rather than reveal social realities. Second, doctrine does not necessarily reflect practice. The actual behavior of regulators and regulated does not necessarily bear any constant relation to doctrine; doctrine, therefore, provides no reliable index either of actual patterns of regulative activity or of the degree of conformity of the behavior purportedly regulated. Third, nationwide generalizations are of little value. India is a vast and heterogenous society. Since the law largely ignores local conditions in favor of nationwide generalizations, it is of little value in understanding local conditions and inevitably obtrudes misleading generalizations. Finally, Indian law is foreign. Much the greater part of modern Indian law is palpably non-Indian in origin and is notoriously incongruent with the attitudes and concerns of most Indians.

Although these objections apply with special force to Indian law, they apply to some extent to all attempts to employ law in the study of society. In this paper I shall attempt to indicate the limited force of these objections. I shall argue (1) that the law provides an instrument through which we may observe some facets of Indian society which are otherwise inaccessible or obscure; and (2) that the same remoteness from everyday life and foreignness, which arouse suspicion of its relevance, lend to Indian law a unique and compelling interest for students of India and of comparative law.

The lawyer turning his attention to India is immediately drawn to the immense reservoir of documents comprising the records made by officials involved in designing, announcing and enforcing the law. For the lawyer, the most visible and accessible part of this body of records--the statute books and the law reports--are the law. For his ordinary purposes of predicting the behavior of officials and designing transactions for his clients, this equation is correct. For it is this part of the literature that is binding authority to the administrators and interpreters of the law--the statutes because of legislative power and the cases because of the doctrine of stare decisis which obliges courts to follow the decisions of their predecessors.



But the "law" is more than the contents of a law library. In its broadest sense it includes--or merges indistinguishably with--all patterns of socially expected and approved rule enforcement.¹ The promulgations and decisions collected in the law library comprise what we may call the "lawyers' law." The law may be visualized as a continuum stretching from this official "lawyer's law" at one end to the concrete patterns of regulation which obtain in particular localities at the other. The "lawyers' law" must be understood in the context of the habits and attitudes of its administrators and clientele. To find "the law" in India we must look beyond the records of the legislatures and the higher courts to the working of the lawyers and the police, to the proceedings in the local courts, to the operations of informal tribunals, and to popular notions of legality.

In order to determine what information about Indian society is contained in the contents of the law library, we must ask what is the nature of the relationship between "lawyers' law" and local practice. To what extent can we discern this relationship from the materials collected in the law library? What does this relationship reveal about Indian society--and about the workings of legal systems generally?

In order to utilize the body of records which comprise a law library, it is necessary for the investigator to take into account some of the peculiarities of this literature. He must equip himself to discount their characteristic biases and distortions and to interpret them in view of their generic peculiarities.

Statutes and regulations are relatively straightforward. They promulgate rules, sometimes accompanied by an (often idealized) account of the reasons which led to their enactment. Such rules reveal the shifting focus of legislative concern--the awareness of new interests deserving of protection, of a new balance between contending claims. They may also reveal a shift in rhetorical stance, in assertiveness, in claims to regulate previously immune areas. In reading a statute, we must remember that it is addressed to an audience of officials and lawyers for whom its terms may have special technical meanings and who are expected to be aware of applicable canons of construction and of the context of existing regulation. But the mere text of an enactment gives us a very incomplete picture--we must see how it has been interpreted and where it has been applied or not applied.

For this we turn to the law reports which are more complex and difficult to work with. They are certainly more difficult to locate--only by threading our way through a labyrinthine system of references can we be sure we have

¹There is, of course, no exact line of demarcation between law and the many other kinds of rules that are found in society (etiquette, technology, etc.) As Weber (p. 20) puts it "law, convention and usage belong to the same continuum with imperceptible transitions leading from one to the other." We may think of law as that part of the continuum in which the sanctions applied to the neglect or infraction of rules involve the use or threat of physical force by an individual or group possessing the socially recognized privilege of so acting. (Hoebel 28)



collected all of the relevant cases. A single case is a fragment; its importance and representativeness cannot be assessed by examining it in isolation. Although sweeping language may be employed, each case decides only a few specific points as they arise in a single factual situation. It is only by comparison with cases involving other factual situations that we can estimate the thrust of the broad language. It is only by collecting a number of cases dealing with related factual situations that we can discern the "rule" they embody and estimate the range of deviation and permissible leeway built into such rules. By collecting a set of related cases, we may form a mosaic lens through which we may view the pattern of regulation.

But what do we see in these cases? Several warnings are appropriate--some which apply to any system of recorded case law, some peculiar to the common-law system, some which apply to any "colonial" situation, and finally some which are peculiar to India. First, the cases found in the law reports are for the most part appellate cases. They are not accounts of trials at which witnesses are presented and evidence taken, but rather accounts of proceedings in which the conduct of such a trial, having been challenged by the losing party, is reviewed by a superior court--sometimes two or three times removed from the trial court. The recorded opinion is not a narrative record of the appellate proceedings but is only the last stage of it. It tells us how the subordinate courts acted under given circumstances and records the decision of the superior court, either approving such action or ordering some modification of it. The approval or modification is rationalized in terms of generally accepted doctrine with sources in constitution, statutes or earlier case-law.

In these reports of appellate-court review, we get a picture, sometimes vague but more often fairly clear, of the factual situation that obtained between the parties and often a surmise about the frequency or rarity of such situations. This factual account is an oddly distorted one--there may be great gaps in matters of little relevance to the outcome of the litigation and considerable elaboration of detail in regard to matters thought to be crucial. Since, under an adversary system of justice, the court has no independent fact-finding apparatus but is dependent on the contending parties for the presentation of evidence, the appellate court's picture of the facts is a composite made by sifting two partisan (and often incomplete and misleading) accounts. Again, the record before the court in the appeal has been strained through the sieve of the rules of evidence (which emphasize fairness rather than strict relevance and so may exclude much pertinent information) and the procedural rules which may impose their own bias into the record.

The outcome reached by the appellate court will color the opinion writer's judgment as to which of the facts are significant. Llewellyn observes that in American courts "the better written the opinion, the more likely the facts are to be organized in support of the judgment; and some uncomfortable facts may be omitted."² But he finds that in any event most opinions "instead of being sharply slanted, tend rather to sprawl a little in their presentation of the facts" so that the contrary aspects of the situation are revealed. This may be especially the case in India due to the tendency of Indian courts, unlike their more hesitant American and British counterparts, to decide every possible issue of fact and law

²Llewellyn 361



which arises in the case.³ For example, where one of several alternative defenses is upheld, the court will proceed to consider the others even though they are, strictly speaking, irrelevant to the decision.

No matter how exhaustive the account given by the court, the reported case is not necessarily to be taken as the entire history of the dispute. Unlike the manner in which disputes are settled by political processes or by panchayats, in which a variety of claims and counterclaims are balanced and accommodated simultaneously, formal judicial processes tend to isolate and settle single issues instead of whole disputes. Issues which do not exist in isolation are isolated and settled in an all or none fashion. Such decisions then may represent not so much settlement of a dispute as one phase of a continuing dispute. Thus records of litigation are not the full account of a dispute but parts of its history.

Appellate cases are peculiar in yet another way. The total caseload of the trial courts is itself an unrepresentative selection from the multitude of similar transactions and occurrences—a selection of disputes and trouble cases in which the course of events was disturbed to an extent that inertia and informal dispute-settling mechanisms could not resolve. Appellate cases are an even more unrepresentative group. If we discount that possible sizable number meant merely to cause delay, expense or harassment to an opponent, the cases carried to the higher courts have several distinctive characteristics. They involve sizable interests or claimants who can afford expensive litigation. Allowing for the indeterminacy introduced by the vagaries of proof and granting that some authority can usually be marshalled to support each side, the outcome of most possible litigation is predictable. But appellate cases are those in which lawyers can foresee different possible outcomes.

Reported cases are only a small and unrepresentative fraction of all appellate cases. They are selected to be reported because they represent some modification or new application of existing law. In India about 2500 a year out of a total of about 50,000 cases dealt with by the High Courts are reported.⁴ While all the decisions of the higher courts, whether reported or not, are theoretically binding on subsequent courts, in practice only those which are reported become effectively part of the body of binding and authoritative precedent.⁵

³The prevalence of cases with such "alternative trains of reasoning" raises interesting questions for the whole doctrine of precedent. See, e.g., Jaiwant Rao v. State of Rajasthan, A.I.R. 1961 Rajasthan 250 and Buchi Reddi v. Savitramma, A.I.R. 1961 A.P. 305, both holding that all the lines of reasoning have equal authority, even though the previous case could have been disposed of on one point.

⁴"A Strange Proposal: Move to Liquidate Private Law Reports," Supplement to All-India Reporter 1956 October p. 14; Law Commission, Vol. I p. 636. The Law Commission lists a total of about 45,000 "certain categories of proceedings" in 11 (of the 18 then existing) high courts in 1955. Id., pp. 110-11. These High Court proceedings represent only a tiny fraction of some two-and-a-half million proceedings of all kinds handled by the court system in 1956. Id., p. 137 ff.

⁵Law Commission, Vol. I, p. 629-30.



Although many reported cases are entirely predictable, a substantial portion of the cases found in the reports reveal not only the application of pre-existing law but the re-working and transformation of the law by the judges. There are well-known indicators of modifications in legal thinking: the overruling of an accepted line of cases, the creation of legal fictions, the appearance of divergent lines of opinion. But more subtle and more characteristic is the slow re-working of old concepts to make them fit new situations, the stretching of slim precedents, the confining of uncomfortable ones—all done under the pretext of merely following authority and seldom with explicit acknowledgement that movement is taking place. Llewellyn has catalogued the multiplicity of techniques employed by common law courts in handling precedents so as to enlarge, reduce or dispense with them.⁶ He lists sixty-four techniques, many or most of which are familiar to readers of Indian law reports though they may appear in different proportions there than in American reports investigated by Llewellyn. They may even be accompanied by some peculiarly Indian techniques such as the High Courts' use of Supreme Court dicta to ignore High Court rulings.⁷ The multiplicity of doctrines of statutory construction permit comparable flexibility in the handling of statutes.⁸

Thus the judge transmutes past authority into present law by introducing change in the guise of conformity. Law is rewritten as it is reiterated; as subsequent decisions are added to the corpus of authority, the meaning and importance of old decisions changes. Lawyers phrase their arguments about what the law "is" in terms of what it has been. Lawyers, judges and law books are interested in the present meaning of a past decision—in its meaning now and for all courts and lawyers and not what it meant at the time and place of its delivery. This makes cases and secondary materials difficult for the social analyst to use. As Maitland says:

The process by which old principles and old phrases are charged with a new content is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are attempting to mix two different logics, the logic of authority and the logic of

⁶Llewellyn 77

⁷Compare, e.g., Kalinath v. Nagendra Nath, A.I.R. 1959 Cal. 81, 83 where the Supreme Court dictum was followed even though the decision was on other grounds since "the Supreme Court Justices took a definite view on this point. . . it is binding on us," with Pardhasaradhi Rao v. Srinavasa, A.I.R. 1959 A.P. 512 where the court carefully distinguished the Supreme Court case as "only authority for what it actually decides and the generality of expressions in it are not intended to be expositions of the whole law but are governed and qualified by the particular facts of the case. . . ." 516. See W. D. Popkin, "Prematurity and Obiter Dictum in Indian Judicial Thought," in Journal of the Indian Law Institute, Vol. 4, No. 2 (1962) at 247 ff. For another Indian departure, see note 3 supra.

⁸Llewellyn 371 ff., 521 ff.



authority and the logic of evidence. What the lawyer wants is authority and the newer the better;⁹ what the historian wants is evidence and the older the better.

But if the law at any time is what the judges say it is, there are factors which severely limit the extent of change introduced by judicial techniques. Judges are conditioned by the ideology of *stare decisis*, by their own training and their loyalty to a limited number of known techniques for handling law and facts, by the limitations imposed by the fixed frozen record of the case and the narrowing and phrasing of issues by counsel, by the presentation of questions that are merely fragments of branches of the law, by the making of decisions in groups and the necessity of giving their reasons in a written opinion, by their insulation from public pressure and political retaliation, and by the insistent pressure of professional opinion.¹⁰

Judicial re-working of the law is often taken as an expression of changing values and changing perceptions of society. But one must add a qualification. Judges are usually an insulated and detached group with their own peculiar perspective on society; this detachment and separation are particularly intense in India. If the judiciary is expressive of and responsive to the values of the social groups from which it is drawn, we must remember that this may be a group far removed from the law's clientele. The judge's training and experience intensify this isolation. It has been suggested that, as compared with other officials, judges as a group stood outside Indian society and its values and tended to know little of the districts.¹¹ This tradition of detachment continues today and is promoted by deliberate insulation of judges from public and political pressure.

Under these circumstances it is not surprising that there is a divergence between the values and perceptions of the judges and those of the law's clientele. We might expect that the law is less than fully responsive to the concerns of its clientele. To the extent that the values and perceptions of judges are representative of smaller groups within the society rather than of their clients directly, we may view the cases as a reflection of the perceptions and aspirations of these ruling groups and of the techniques they use to make actuality conform to these.¹² There may be--and in India often is--a wide divergence between these ideals and aspirations and those of the clientele. By the disposition of governmental power in their service and by the prestige of urban and official centers, these aspirations and perceptions are powerfully recommended to the clientele. Thus we can think of the courts as agents for the diffusion of

⁹Maitland 57. In spite of their penchant for using old bottles, common lawyers are not very nostalgic or inclined to put a value on the old for its own sake. Unlike other areas of cultural life, its custodians have no pronounced antiquarian bias--nor, like art are its different periods accorded equal status. For the lawyer, the newer supplants the old--or at least modifies it; the old has no autonomous value.

¹⁰Cf. Llewellyn at 19: Maine at 48.

¹¹Cohn (1962) at 186.

¹²Cf. the statement of a Nigerian lawyer that "the law and the constitution of a people are an expression of the social consciousness of their leaders." H. O. Davies, "The Legal and Constitutional Problems of Independence" in Peter Judd (ed.), African Independence (New York, 1962) p. 328.



these notions. Cases presenting concrete disputes arising in a local context proceed from the lowest court to the subordinate judge in the district town to the High Court in the state capital and perhaps to the Supreme Court in Delhi. Authoritative doctrine flows through this network in the opposite direction. The law reports reveal only the top end of this process--the rationalizing, urban end. Although some of the earlier stages are telescoped in the report, local concerns may be obscured by the efforts of counsel to rephrase them in terms of national and official standards. As they climb to higher courts the degree of formality in presentation and the emphasis on doctrine increases. To get a full picture of a litigation it may be necessary to supplement the law report by the unpublished record of the trial court. As a record of the response of the urban official center to a local situation the law report may serve as a valuable supplement and counterpart to the field study which sees national (or regional) policy in its incidence at the local level.

In legal materials, local concerns tend to be seen through the lens of national standards. It is the fashion today for students of Indian society to eschew nationwide generalization in favor of the description and analysis of local conditions. This 'localism' serves as a valuable corrective to the ambitious generalizations which have comprised much of the literature on India; one hopes that studies of Indian society in its local detail and variation will provide a basis for more fruitful generalizations. However, legal studies can claim at least partial exemption from the imperatives of localism. For if there is no nationwide Indian system of caste, of kinship, of religion or of land tenure, there is what might be called an all-India legal culture. The student of law is concerned with doctrines and procedures which subsume diverse local conditions while being influenced by them only to the extent allowed by nationally prescribed standards. From the variety of local instances, lawgivers and courts, applying nationwide standards in accordance with nationally accepted techniques, fashion a common doctrine which in turn has some influence on diverse local situations. To the extent that there is a nationwide legal community in India, the law reveals the 'culture' of that community--its values and attitudes and their embodiment in patterns of practice and personal relationships. The study of law can usefully supplement detailed accounts of local conditions by providing a picture of the standards and procedures injected into each local situation by the nationwide network of legal agencies. It provides us with a picture of one of the unifying networks that make India more than a congeries of localities.

Nationwide legal doctrine does not correspond with any exactness to concrete patterns of regulation and still less to the behavior it purports to regulate. The law contains much that is mere lip service and rhetorical gloss. Legal doctrine, like religious or aesthetic, tends to be normative and didactic.¹³ As in studies of religion or art, there is the problem of assessing the actual impact and effectiveness of doctrine.¹⁴ After recognizing their value in revealing the self-image and normative principles of their compilers, there is the problem--generic to all textual studies--of assessing their value as descriptive materials.¹⁵ However, in this respect legal texts are different

¹³Singer 301.

¹⁴Singer 280.

¹⁵Singer 300. Cf. Hoebel (42 ff.), who suggests that case-material need be discounted to the extent the facts are subject to idealization or 'projective recasting.' In India we must add the problem of perjury and fabricated evidence. If the things reported did not actually happen, they are apparently things that might well have happened. Cf. the observation that in India real criminals are often convicted of their crimes on false evidence.



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from religious or aesthetic ones. First, the professionals engaged in compiling the texts are themselves parties to the situations being described--in effect we are getting their rationalization of their own action in the dispute. Second, the law differs from other textual traditions in its self-conscious concern with the authoritative character of its component elements. The law has in common with religion institutionalized agencies for preserving and modifying its tradition. But it is distinctive in its explicit concern with the effectiveness of its doctrinal components--i.e., it is intensely self-observing on the question of its own impact and effectiveness. In a modern rationalized legal system--more so in the work of hierarchical courts than in legislatures--the law incorporates within itself a measured view of its own context. The adjudicatory mode of law lends it this special self-observing character; the report of a case inevitably involves consideration of the extent to which local practice conforms to widespread "official" standards.

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PART I

Law and Traditional Society in Modern India:
The Formative Era (circa 1800-1860)

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I - 1

CASTE, COURT AND CRIME*

Let us begin with a tale. Hurruckhand Motteechand (HM) was a member of the caste of Shravak [Jain] Beesa Ooswal Bunyans, a community of about 250 at Surat. In 1804 he was accused of murdering his wife, imprisoned, and went for trial before the Surat Sessions in April, represented by his wukeel (pleader), Nanabhaee Goolabchund (NG). HM was acquitted of the murder charge and released from prison. However, the heads of the caste refused to readmit him to caste fellowship and never invited him to occasions of mourning or rejoicing. HM did nothing until 1806, when his daughter was 14 and he wanted to find a groom for her within the caste. In April 1806, he brought suit against Khooshalchund Goolabchund (KG) and ten others who comprised the Punchayut of the Shravak Beesa Ooswal Bunyans of Surat to recover damages of Rs 1000 for loss of caste. The defendants answered that the expulsion was the act of the whole caste, not merely of themselves; that HM's children had not been deprived of caste; and that two meetings had been held about this, but that the caste could not come to any agreement to readmit him. On May 10, 1806, N. Crow, J. delivered his decision. He said that the punchayut members had not proved any crime or offense by HM that would justify the expulsion "as required according to the Shastrees." They had merely acted on the basis of the crime of which he was acquitted by the Surat Sessions in 1804. Thus they were "guilty of an insult to Government by contumelious rejection of the proceedings and competency of its judicial authority. . . ." He awarded HM the requested damages of one thousand Rupees.

The eleven defendants then proposed HM's readmission to the members of the caste, but at a meeting of the whole caste they refused to receive him. At this point HM was permitted by the caste to marry off his daughter to a member of the community.

That same month (May, 1806), HM brought another suit, this time against Durmchund Abeela (DA), a caste dignitary and 21 other members of the caste for having, by their particular hostility and opposition prevented his readmission into the caste which, he said, would have otherwise been brought about by the mediation of the eleven persons against whom he obtained the above decree. The court awarded one thousand Rupees damages against these defendants.

* Hurruckhand Mootteechund v. Khooshalchund Goolabchund and Ten Others, the Punchayut of Shravak Beesa Ooswal Bunyans, II Borradaile 38 (1811); Durmchund Abeela v. Nanabhaee Goolabchund, I Borradaile 13 (1809).

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At this point the head of the caste, KG, voluntarily submitted a paper from his party, agreeing to readmit HM to the privileges of the caste if he would in turn waive payment of the decree against them. Apparently he proposed this to the caste, but on August 5, 1806, the whole caste assembled "tumultuously" and rejected this course. The judge then ordered execution of the decrees. The second batch of defendants paid up but the first eleven were ordered confined in jail until they paid the damages or secured the readmission of HM to the caste.

On April 28, 1897, HM appeared in Court with a rich man of the caste to complain that KG and seven others still thwarted his readmission by refusing to tear up a paper of rejection signed by the whole caste when he was first expelled. The rich man complained that he had been threatened with excommunication if he invited HM to his dinners as he wished to do; and that many persons friendly to HM would not attend his dinners, because they did not know how to act. The court called up KG and his fellow defendants and finding this complaint true, confined them until they should readmit HM to his privileges.

Leaving the caste members safe in the lock-up, let us digress from the story of HM and turn to his pleader, Nanabhee Goolabchund (NG). He lived next door to Dhurmchund Abeela (the caste dignitary mentioned above) and there had been a long-standing dispute between them about drains. Dhurmchund was the "Peshwa" or president of the caste's temple. He was, as we have seen, in jail in execution of HM's decree against him for Rs 1000. One of his duties as peshwa was to superintend the annual feast in celebration of the birth of Chundr Prubhoo and to invite the members of the caste to it. DA's son ordered the temple servant not to invite NG or accept a contribution from him and the servant felt bound to obey it. NG then went to court and brought a suit against DA for loss of character. The defendant replied that invitations were not given individually, but to those living together whether forty or fifty at once; and that the pagoda was the house of God, no invitation was necessary to enter it. The Assistant Judge in Surat on March 2, 1808, found for the plaintiff and awarded Rs. 1000 damages. DA appealed to the Court of Appeal at Broach, where in September, 1808, T. A. Grant and J. Smith, JJ., affirmed, holding that the defendant had attempted to intimidate NG while the latter was exercising the office of pleaser and it was necessary to extend support on general grounds to such persons. A further appeal was taken to the Sudder Dewani Adawlut [i.e., Chief Civil Court] at Bombay, where in March, 1909, Jon. Duncan, Pres.,



and T. Lechmere and R. Rickards, JJ., affirmed the award while cautioning the lower court that in the future only actual damages should be awarded (as distinguished from the punitive damages allowed in this case).

To return to HM. The defendants in both of his earlier suits (the eleven and the twenty-two) and the seven others who had held out against destroying the deed of expulsion took an appeal to the Court of Appeal at Broach. As justification for expelling HM and keeping him out of the caste, they alleged that HM had confessed the murder of his wife to members of the caste; and that furthermore since the whole caste had signed the deed of expulsion, only a meeting of the whole caste could annul it and a full assembly of the caste had positively refused to do this. The Court of Appeal gave them a month's time to adjust the dispute by securing the readmission of HM. At the desire of the caste, HM made a submission to KG to induce him to destroy the paper of expulsion, which he still refused to do. The month having elapsed without HM's readmission, the Court of Appeals affirmed the decrees of the lower court and awarded costs against the appellants.

The forty defendants then appealed to the Sudder Dewani Adawlut in Bombay, where their appeal was heard by Duncan, Lechmere and Rickards, who had already heard NG's case. The appellants argued that a caste had a right collectively to refuse common intercourse with a man guilty of any crime. They said that they had obtained sufficient proof of HM's guilt conscientiously to believe that he committed the murder, even though the evidence might not be conclusive enough to have warranted his conviction in the Court of Session. Their investigation, they said, "was not with a view to change the sentence of the Court but was in exercise of a privilege possessed for ages, of preserving the caste free from the contamination and disgrace of associating with a man conscientiously believed by them to be guilty of a crime. . . . and this right of choosing their own associates being inherent in the caste individually and as a body, notwithstanding any previous trial of the criminal." They were convinced, they said, that their proceeding would be upheld by the members of the caste everywhere and they were ready to have their actions judged by members of the caste throughout Goojerat.

HM answered that he had allowed himself to remain excommunicated for two years without complaint only because of poverty. He denied that he had



ever confessed the murder. He cited the authority of the Muyookh Shastre^{*} which left the punishment of murder to the discretion of the [government's] judge.

In reply, the appellants quoted two verses from the Oopdes Mala, a book of the Shavuks, to the effect that "a troublesome man who disturbs society by the ill use of offensive weapons or insults society (by the commission of any crime) is to be expelled from company and caste like as angels do not associate with devils."

The Court asked the Advocate General of Bombay, Mr. Thriepand, who was the Reporter to the Sudder Adawlut, to report on the matter and he made the following report:

On the ground of public policy nothing can be more obvious than that the jurisdiction which is exercised by caste in this country, ought as little as possible to be interfered with. It is a power which experience does not prove to be liable to much abuse, and its proper exercise is of such eminent utility in the prevention of misconduct on the part of our native fellow-subjects, that whatever tends to weaken its authority must be accounted an evil of considerable magnitude. The injustice done by the [caste] decree must therefore be flagrant indeed, before I should think it wise to overturn the deliberate decision of a numerous and respectable caste, or vindicate an individual member in setting its sentence at defiance.

[Mr. Thriepand then granted that an innocent person ought not to be expelled, but that the question was whether his acquittal before the Court of Session should be considered so completely demonstrative of his innocence that no room can be left for anyone to believe him guilty. To do so, he concluded, carried the judgment of the criminal court further than it has any right to be carried. A court that acquits, he observed, is often impressed with consciousness of the accused's guilt.]

It is precisely in such cases that the benefits of an ulterior caste jurisdiction are most likely to be felt. By its means. offenders,

* = Muyukha or Mayúkha Sastra. "... one of the twelve treatises by the same author, all bearing the same title of Mayukha, and treating of religious duties, rules of conduct, penance, and expiation, etc. . . . The whole of the Mayúkhas are designated collectively as the Bhagavat Bháskara. . . . Little or nothing is known of the author, Nílakantha, beyond that he was of a family of Dishast Brahmans, and it is generally accepted that his work was composed about a hundred and fifty years since [i.e., about 1700]." "The Vyavahára Muyúkha, which is the sixth in the list, is devoted exclusively to law and justice, and is a general digest, or collection of texts, without much commentary" Morley described it as "The greatest authority, after the Mitákshara, in the Maharashtra school [of Hindu law] . It was translated by Harry Borradaile and published in 1826 by order of the Government. William H. Morley, An Analytical Digest of all the Reported Castes (London, 1850), Vol. I, pp. ccxxiii-ccxxiv.



against whom there may not be sufficient proof to warrant conviction which would subject them to loss of their lives, may still be made amenable to penalties and deprivations, the dread of which cannot fail to operate with salutary influence, and are so far from being subversive of the authority of a regular court, that they are rather to be viewed as coming in aid of that authority, and by making men anxious to avoid the appearance of guilt, cannot fail on many occasions to prevent the reality.

.....
To consider such subsequent infliction as a reproach to the Court which pronounced the sentence of acquittal, seems to be founded on a wrong impression . . . [I]t is no reflection on its decision to say that the evidence is sufficient to justify persons who may fairly take a greater latitude in judging (and who ought to do so if they would be of real use) in pronouncing a sentence of inferior severity.

[Even an innocent man whose conduct had created grave suspicion of having murdered a near relation may be obnoxious to the prejudices of some castes. But if such is the prejudice and they choose not to associate with him, he concluded, "it is a vain and hopeless task to combat this with oppressive exercise of authority."]

The question in short is whether castes, in determining who are fit persons to continue in their respective bodies, are compellable to see only with the eyes of a court of law, and to hear with its ears. If it were sound policy to endeavor to effect the abolition of all such native jurisdiction, I should recommend this restraint being put upon them; but if their authority is to be maintained, I should advise their acts to be only called in question when they plainly proceed from revengeful or malicious motives, not where they are ascribable to a conscientious, even though it should be mistaken, opinion of crime.

[He concluded by suggesting that as equitable a mode as any of settling this dispute, would be to refer it to the caste throughout Gujerat, under the express condition that their decision should be binding and conclusive.]

The President of the Sudder Sewani (Jonathan Duncan) thought the reporter's view of the case very satisfactory and supported the reference to the caste throughout Gujerat. Mr. Rickards took the occasion to express some doubts about the case. First, he found, the amount of the injury was quite uncertain, since the expulsion did not effect his civil rights, nor did it effect the civil or religious rights of any of his family or his children. Of course, panchayats cannot excommunicate without some crime being ascertained

Whilst it would be impolitic to countenance the exercise of authority by Panchayats in opposition to, or contravention of, the regular decrees of our established courts (the evil of which might be incal-



culable), yet in cases which partake more of a moral than legal nature . . . I think it would be always advisable for our Courts not to interfere. This seems to be a case in point; no court of law can force an individual or any number of individuals, to choose their own associates, and if the expulsion of HM amounts to nothing more (and these proceedings do not show anything more) than what we should call sending to Coventry for a crime generally believed but incapable of positive legal proof, I am of the opinion the decrees of the lower courts are severe and even unnecessary.

Considered as a moral corrective, the power of expulsion from society, if it involves nothing more than disgrace, no other violation of personal or proprietary rights, and only exercised, as it generally is in this country, with prudence, may produce salutary consequences, and be operative to the benefit of that society in various cases beyond the proper cognizance of courts of justice.

Noting that the decrees of the courts below cannot actually restore to HM the society of the defendants, he concludes, "I therefore think the case a proper subject of caste adjustment." He suggested that if the dispute were only "partially decided," then an ultimate verdict should be elicited from properly selected persons drawn from the whole caste in Gujerat and Bombay.

The case was then referred to the decision of the Caste in Gujerat under a condition that their decision would be final and binding. On July 30, 1811, the following answer was received from the members of the Beesa Ooswal caste of Bunyans residing at Ahmedabad:

As you mention that the people of the caste of Surat have excommunicated him, it appears to be a dispute of the caste; he must therefore satisfy them before his readmittance, without which it cannot be allowed.

The Sudder Adawlut on November 4, 1811, affirmed this award, reversing the decrees of the lower courts and ordering HM to repay the damages that he had received.

* * * * *

The issues that trouble the courts in the cases of Hurrukchand and Nanabhee have continued to trouble the British and Indian governors of India down to the present day. Besides the official law promulgated and enforced by the government, there are a variety of non-governmental groups promulgating rules, deciding disputes, and taking collective action to uphold norms. These norms may have only slight representation in the official law or they may even run counter to it. How are these to be reconciled? Are the indigenous tribunals to be excluded from consideration of all matters? All matters which are cognizable in the courts? Where these tribunals are allowed to act, should there be any check on them by the official courts? Should this take the form of a general



supervision over the merits of the controversy or should it be confined to guaranteeing some minimum of regularity and fairness in procedure? If the actions of these tribunals are acceptable, what degree of official support and enforcement should be lent to them? Are these tribunals to be recognized as mere enunciators of established usage? Or do they have a power to make new usage?

Which of the many matters that engage these indigenous tribunals shall be cognizable in the courts? Are there some matters which are best left to be worked out by whatever non-official methods can be found?

To what extent should official courts undertake to vindicate the kinds of rights and privileges established by custom and usage. Insofar as they do, to what sources shall they look for authoritative determination of what these rights and usages are? Long-established usage, contemporary opinion, revered texts?

In the following cases, we shall trace the handling of these problems through several stages. First, under the heteronomous legal system which the British erected during the earlier part of the nineteenth century. A second stage begins about 1860 with the reorganization of the legal system. At that time the courts in each province were organized into a unified hierarchy to administer a uniform body of law throughout the province; the first codes were passed, replacing the various bodies of law up to then applicable; the native law officers (Pundits and Moulvis) who assisted the judges were dispensed with. Finally, we shall look at the treatment of similar problems in modern India, where a layer of constitutionalism has been added and the government has embarked upon a vast reconstruction and transformation of traditional society.

* * * * *

To return to our case for a moment: is Mr. Richard's distinction between "moral" and "legal" a viable standard for answering these questions? How does one decide what is a legally cognizable right? Does the characterization here reflect an English or an Indian understanding? Do (a) the benefits of caste autonomy or (b) the difficulty of supervising it, affect their judgment of what is a "legal" right?



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SHUMBHOODAS RAECHUND V. DHOOLLUBH POORSHOTUM

I Borrodaile 386

Court of Appeal, 1808

[The caste of Ahmudabadee Beesa Khundaita Bunyans at Surat had been troubled by the rich persons sending outside Surat for wives, which left the daughters of the poorer members unmarried. In order to put a stop to this and to regulate in other ways the incursions of outsiders, the caste drew up written by-laws which fixed dowries, regulated the rights of outsiders and provided that anyone giving a daughter in marriage beyond the walls of Surat should be deemed an offender against the government and against their titular deity and should not be allowed any connection with the caste. The by-laws were signed by 146 persons and were then registered with the Adawlut (court). Shumbhoodas Raechund (SR), who was one of 13 who refused to sign the by-laws, was excluded from caste dinners for arranging a marriage for his niece with an outsider. Apparently this was a temporary excommunication rather than complete expulsion, for members of the caste ate with him at private dinners and the other castes of Bunyans maintained relations with him.

SR brought suit against the caste to recover damages for expulsion. The trial court thought that SR had justly incurred the penalty, which was by no means oppressive or unjustified, since he could regain his privileges by making concessions to the caste. The court thought the by-laws were deserving of support inasmuch as they tended to lessen expense of marriages.

On appeal, the Court of Appeal declared that SR had been unduly injured since he did not subscribe to the bundobast (arrangement). But, viewing the object of the by-laws as highly beneficial, the Court recommended that SR and the 12 other holdouts become parties to it. He agreed to do so, and the court entered an order that upon signing the by-laws, he should either be restored to full privileges or the defendants should pay damages.]

NOTE: Is the Court enforcing majority rule in a caste? See Bhoola Runchor v. Rulyat, I Borrad 90 (S.D.A. Bom., 1813), where members of the Dussa Shreemalee Bunyun Caste sought to remove from office the Nyat Gour of the caste, claiming that a majority of the jurmant had a power to transfer this office to another. After asserting that the Shastr contained nothing on this subject, the court referred to the "Raijool Moolk" [custom of the country]; it found that according to custom, the office was hereditary and "the holder of it could not be changed except by unanimous consent."

Suppose the object was not clearly beneficial? Suppose it was counter to public policy? In Gerdhur Moolje v. Jugjeeven Luxmeechund, Sel. Cases

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S.D.A. Bombay 94 (1843), the panchayat of gold thread spinners sued a member to recover a fine for infringement of a by-law providing that no member was to take any work from the wire-drawers until the latter righted an injury to the panchayat. The Sudder Dewani Adawlut reversed the lower court, which had allowed recovery, on the ground that by-laws and private engagements which tend to injury of the public cannot lawfully be made the grounds of an action.

Suppose the by-law was neither beneficial nor injurious -- e.g., specifying the order in which guests at a caste feast may commence eating?

Does it matter that the by-laws were registered in court?

BHAECHUNDBHIKARIE V. PURMANUND

II Borradaile 475

Sudder Dewani Adawlut, 1823

[The Guliyaras (Guleearas, Gooliyarus) or Indigo makers and dyers of Broach unanimously drew up a set of by-laws in which they agreed on certain fees and distribution of work and on the prohibition of private dyeing, with a provision that whoever departed from these rules was to pay Rs. 50 as a fine to the government. The by-laws were registered at the Adawlut. Bhaeechund was turned out of the Jumaut for breach of these by-laws, of which he was a signatory. He now brings suit against the Jumaut to obtain readmission.

The Court consulted its shastrees (Hindu Law Officers) who said that any body of men can make such a by-law among themselves without the consent, or against the will, of one member and that one member cannot break it, whether he previously agreed to it or not, and that they have the power of fining a person for breach. If they are obliged to apply to the prince, he should affirm the bundobust and fine any one who breaks it, for it is thus written in the Sumvidhvyutikrume Prukurn, or 'chapter on opposing the acts of a body' [i.e., Mitakshara, Bk. II, leaf 72, p. 2] "let the prince confiscate all that man's estate . . . who acts contrary to the rules established by(a body)."]

The Judge, after this reply, said the caste must be presumed to be the best judges of their own interests, and as this combination excluded no individual from participation . . . the court was of the opinion that the act of the majority, grounded upon equality of right and privilege, and contested solely by one dissenting member of the panchayat, ought not to be interfered with, unless some specific proof of the existence of oppression or other exercise of arbitrary

* The court explains that Jumauts or Poogo are manufacturing companies, generally composed of members of different castes. A member turned out from such a company still retains the privileges of his own caste unimpaired. However, in this case all the Gooliyarus of Broach are said to be of the Chheepa caste.



power were distinctly set forth. In the present instance, the caste has merely exerted a right common to all classes, that of adopting a system of procedure in their opinion most likely to benefit the general body. . . . Although a general superintendence is vested in the courts for the due preservation and protection of the rights and privileges of every part of the community, yet still it was far from desirable that every refractory member of a punchayat should at will make the Adawlut the arbitrary instrument of forcing a large body of men into his own views and interests.

Although one of the judges thought that outcasting was too severe for such an offense and the panchayat ought rather to enforce the penalty (of a fine to the government) as stipulated in the by-law, the Sudder Devana Adawlut affirmed the decision of the trial judge, who dismissed the suit.

NOTE: In all of the above cases, it was the outcasted party that was seeking the intervention of the court. Does the respect for caste tribunals displayed in these cases suggest that the courts would act affirmatively to uphold the caste's decree of excommunication?

In Lalsooner v. Sumbhoo Narayundas, I Borrard. 419 (Ct. of Appeal, 1811), the milkman caste sued three of its members to compel them to refrain from communion with LN, who had been excommunicated 23 years before "because his daughter became a Mussulmanee." The three offered the defense that LN had in fact been readmitted to caste privileges by VS, who, they allege, is the setheea* of the caste and has power to absolve from excommunication. The plaintiffs contested VS's title to this office. The trial court polled the caste and found 144 to be against LN and only 115 in favor of VS's act of absolution. The Court concluded that the defendant's attempt to reinstate LN without the consent of one of the plaintiffs who had a better title to the office of setheea was irregular and issued an injunction ordering the defendants "to refrain from communion with LN until he had atoned to the satisfaction of the caste for his offenses."

On the basis of the cases previously read, what should the Court of Appeal have done? It Affirmed.

* * * * *

In 1827, new Regulations were promulgated in Bombay. Section 21 of Regulation II gives civil courts jurisdiction

generally of all suits of a civil nature; it being understood that no interference on the part of the Court in caste-questions is hereby warranted, beyond the admission and trial of any suit for the recovery of damages on account of an alleged injury to the caste and character

* I.e., Seth or Sethi, head of a mercantile or trading body or headman of a particular trade.



of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party.

Which, if any of the previous cases should now have a different result? Does this settle the troublesome questions?

BAEEKHOOSHAL V. TOOLSEE KHANJEE

Bellasis 25 (SDA Bombay, 1842)

[A lady of Kurya caste was expelled when leaving home after ill-treatment, she was found on the verandah of a Mussulman's house. She was expelled for associating with a Musselman and later brought suit against her husband and fifty-four other caste members for loss of character resulting from this expulsion. Compare the following reactions of the judges of the Sudder Dewani Adalat:]

J. Pyne: "I find the Courts so unanimous in supporting the awards of caste, and so opposed to any interference with their decisions, unless it can be distinctly shown that they have been marked by malice and oppression. . . ."

B. Hutt notes that this is a claim for readmittance, not for damages to caste (i.e., in the nature of defamation) and it is thus entirely a caste question and excluded by Section 21 of Regulation 2 of 1827. The cases "entirely support the view that it is incumbent on a member to submit to the fiat of the caste and that it is not proper for our Courts to question the justice of their decision."

Gilberne, dissenting: The court should be satisfied in all such cases "that the caste have instituted a fair and proper inquiry into the merits of the case and have decided on the expulsion of a member in all good conscience. I think the Courts are bound to enter into such particulars,--the Hindu law requires as much--Justice demands it--and we should not decline to interfere merely because the act is the act of the caste." Here the grounds for expulsion have not been established, according to law, and the evidence brought forward to support it is unsatisfactory and discreditable.

DECREE: This case barred by the Regulation.

What is the effect of these limits on the powers and prerogatives of the various groups within Indian society? Does it strengthen their hand against recalcitrant members? Against other groups? Does it weaken them by withdrawing government enforcement from their decrees?

* * * * *



So far we have looked at the disposition of courts to intervene in the internal affairs of caste groups. But, traditional Indian society contained many other kinds of relations among peoples that gave rise to complex clusters of rights and duties, privileges and obligations, some hereditary or 'ascribed' and others arising out of various transactions. The legal system set up by the British provided new means of enforcement of rights and immediately faced the problem of the extent to which these "traditional" rights were to be legally enforceable.

BEHOREE GYAWAL v. MUSSUMMAUT DEEPOO

[II. SELECTED REPORTS OF THE SUDDER PEWANNY ADAMLUT, BENGAL (1816)]

This was an action brought by Rughoobeer Deeba (late husband of the respondent) in the Zillah Court of Behar, on the 16th of January 1800, to recover from Hukhum Chund, grandfather of the appellant, the sum of 52,186 rupees. The plaintiff, who was an inhabitant of Gya, stated, that he left that place in the year 1196, F.S, or 1789, A.D., and proceeded to Nagpore, where he established himself as Kurhwa, or chief conductor of pilgrims; that in virtue of this office he became entitled to receive the duchhna, that is to say, all the presents given for religious purposes to their conductors by persons performing the pilgrimage, but that after he had been for three years firmly established, the defendant usurped his place, and accompanied the Raja of Nagpore and his train on a pilgrimage to Gya, receiving money and effects presented on that occasion, amounting in value to the sum specified in the claim. The defendant, after admitting that the plaintiff had been in the year 1196 established in Nagpore as Kurhwa, alleged in reply, that having in the year 1199, immediately before the Raja's pilgrimage, left Nagpore and gone to another village, where he joined the society of Shuhur Chund, son of the defendant, he had incurred the loss of his office. That after his departure, he (the defendant) became regularly nominated by a society of Gyawals to be Kurhwa, and that in virtue of the office



so conferred on him, he had accompanied the Raja to Gya, and performed, during the journey all the religious ceremonies customary on such occasions, and received the presents and charitable offerings bestowed by the Raja and his attendants. That from the property so received he had deducted his own proper share, and distributed the remainder according to usage, among the inferior Gyawals who were of the society.

. . . [T]he defendant had returned to Nagpore with the Raja, and on his re-appearance in Behar, after an interval of seven years, this suit was brought forward. From the evidence taken . . . from persons conversant with the usages of that class of people termed Gyawals, the following appeared to be among the rules of their institution: If a Gyawal or inhabitant of Gya, leave his native place, and settle in another village where there is no person of the same description with him, he becomes Kurhwa or chief conductor of the pilgrims from that village. Those Gyawals who subsequently arrive there, are admitted into his society and share the emoluments subject to the following conditions: If the Gyawal arrive during the season termed ritoo, that is to say, the period of thirty-five days between the first day of the dussarah festival, and the full moon of the month Cartick, and then demand admittance into the society, he becomes entitled to the benefits of partnership even against the inclination of the Kurhwa, nor is it necessary that such Gyawal should accompany the Kurhwa and pilgrims to Gya in order to entitle himself to a share of the emoluments. If he arrive during the season termed kooritoo, which signifies any time during the remaining ten months and twenty-five days of the year, he must, in order to be admitted into the society and participate in the emoluments, either obtain the consent of the Kurhwa for admission, or accompany that person and the pilgrims to their destination. The Kurhwa is entitled, in virtue of his office, to an excess upon his share of the profits equal to one-half the share received by each individual Gyawal; but it is a rule, that if he once leave the place where he had established himself (which place is termed his menda) and enter into a society elsewhere, he forfeits the office.

The only witnesses brought forward to prove that the plaintiff, Rughoobeer Deeha, had incurred this forfeiture, were Shuhur Chund, son of the defendant, with whom he was alleged to have formed a partnership, and some other Gyawals, who were confessedly in the interest of the defendant, and whose testimony was therefore not to be relied on, besides which, it was invalidated by the extreme improbability of the plaintiff's having left Nagpore at the



very time when the office was about to become so lucrative from the circumstance of the Raja's projected pilgrimage. As the defendant therefore had admitted that the plaintiff once filled the situation of Kurhwa, there did not appear to the Zillah Judge any valid reason for supposing his interest to have become extinct.

. . . [On Appeal] the case came on at first before the Fourth Judge (R. Ker) who expressed himself decidedly of opinion that the decrees of the Courts below should be reversed. He observed, that it was an undisputed fact, that Kuklum Chund, the original defendant, had accompanied the Raja on his pilgrimage from Nagpore to Gya, had performed all the rites and ceremonies usual on such occasions in the capacities of Kurhwa and purohit or family priest, had received the duchhna, and had, according to usage, distributed shares of it among the other Gyawals, his companions. He considered the claim of Rughoobeer Deeha, founded on the allegation of his being the real Kurhwa, to be totally inadmissible, and that the Raja and his attendants had obviously a right to select whomsoever they thought proper, to do the duties of that office. The case was however reserved for the consideration of another Judge. On the 17th of January 1816, the Senior Judge (J. H. Harington) having inspected the proceedings, expressed his concurrence in the opinion of the Fourth Judge, and the decrees of the Courts below were accordingly reversed; but it appearing that the plaintiff had accompanied the Raja in his pilgrimage, and that although entitled, he had received no share of the profits, and the appellant agreeing to pay the costs in all the three Courts, on the condition that no further claim should be preferred against him on this account, he was directed to discharge them accordingly; as this arrangement appeared to be equitable to both parties, and, on calculating the sum she would have been entitled to receive, on the whole, rather advantageous to the respondent.

NOTE: Is this replacing "status" relations by contractual obligations?
What does it do to the power of the inhabitants of Gaya to arrange among themselves about their respective rights to serve as guides to pilgrims?

* * * * *



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PHAGOONA NAYEE AND OTHERS (Defendants), Appellants v.
MENYE MATHA AND OTHERS (Plaintiffs), Respondents.

SUDDER DEWANI ADALUT, BENGAL
10 S. D. A. R. 466

The 22nd November, 1854.

Present: Sir R. Barlow, Bart., and H. T. Raikes, Esq., Judges
and J. H. Patton, Esq., Officiating Judge.

Case No. 384 of 1853.

Special Appeal from the decision of Syed Ahmed, Principal Sudder Ameen
of Rungpore, dated 1st April 1853, reversing a decree of Mutiur Ruhman,
Moonsiff of Bhowaneegunge, dated 29th September, 1852.

This case was admitted to special appeal on the 30th August 1853, under
the following certificate recorded by Messrs. J. R. Colvin and J. Dunbar:--

"This was a suit by 13 individuals against 26 barbers, living in dif-
ferent villages, to compel them to shave them.

"The suit was laid at rupees 300. The moonsiff gave a decree for rupees
32, against two only of the defendants. On appeal the principal sudder ameen
extended the decree to the whole of the defendants.

[466] "Such a decree as this appears to us to be of doubtful principle,
it is one moreover of which the courts appear to have no means of compelling
execution. We therefore admit the special appeal to try whether the order
of the principal sudder ameen should not be set aside as regards all the
defendants."

JUDGMENT.

We agree with the judges who admitted the special appeal, that such a
decree as that before us is not susceptible of execution and the suit should
have been dismissed.

The decision of the lower court is therefore reversed.

NOTE: Would it make a difference if the plaintiffs would lose caste
if these specific barbers would not serve them?

RAJ KISTO MAJEE AND OTHERS (Plaintiffs) Appellants, v.
NOBAEE SEAL AND OTHERS (Defendants) Respondents.

HIGH COURT AT CALCUTTA
1 Weekly Reporter 351 (1864)

The 22nd December 1865.

Present: The Hon'ble H. V. Bayley and A. G. Macpherson,
Puisne Judges.

Suit Against Barbers.
Case No. 1828 of 1864.

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Special Appeal from a decision passed by Baboo Jugobundhoo Banerjee, Principal Sudder Ameen of Tipperah, dated the 18th April 1864, reversing a decision passed by Baboo Obhoy Churn Roy, Moonsiff of that District, dated the 30th January 1864.

Baboo Gopal Lal Mitter for Appellants.
Baboo Woomesh Chunder Banerjee for Respondents.

This is a case in which certain parties sue certain individual barbers with the prayer that the latter may be compelled to pare the nails of the former. The first Court found that it had been the custom of the defendant to perform this service for the plaintiffs, and decreed the plaintiffs' case. The lower Appellate Court held that such a suit will not lie. It is urged in special appeal that a suit will lie for the enforcement of an established usage having the force of law, and that the plaintiffs lose caste by the loss of the service indicated at the hands of the individual defendants.

We have carefully considered this argument; but looking at the facts of the case, we think it should be governed by the decision of the late Sudder Court, 22nd November 1854, page 465, in which thirteen parties sued twenty-six barbers to compel them to shave them, and which appears to us to be on all fours with this. It is indeed urged that in that case any barber might have been resorted to, and here the individual defendants must perform the service, otherwise defendants lose caste. But that was not the ground of that decision. It was that the claim was of doubtful principle, and not one of which the Courts could enforce execution.

We are not disposed to find the decision of the Court below is wrong on the facts. We therefore dismiss this special appeal with costs.

NOTE: What makes such a claim incapable of being executed? What would the Court have to do to enforce it? Would it make a difference if Plaintiffs sought money damages? What is the "doubtful principle?" Suppose it was the barbers who sought to enforce their right to shave particular parties?

COOPPA MOOTOO AND FIVE OTHERS v. BAUPEN AND ANOTHER

II Sudder Udalat Appeals 77
[Madras]

No. 64 of 1844

Decided 1844

[Plaintiffs are six barbers who sue to establish their right to shave the inhabitants of certain villages to the exclusion of defendant barbers. Plaintiffs claim these villages are their merassee -- i.e., that they are hereditary village servants who enjoy an exclusive right to perform these services for the villages.]

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If the plaintiffs have a demand on any one, it must be on the parties who refused to employ them as barbers, and who paid the money alleged to be their due to the defendants; but the claim is against common sense and never could be upheld in a country where the law allows the freedom which is enjoyed under the British Government.

The suit is not for recovery of any vested rights, such as fixed emoluments or land appertaining to the alleged Barber Merassee, but merely for certain sums paid to defendants. . . and to prevent defendants [from shaving the villagers]. . . . It is not possible to prohibit any one from following the profession of a barber, much less is it possible to prohibit any man from employing any barber he may please.

[Plaintiffs were nonsuited]

NOTE: What do these decisions do to the barbering trade? Do they impair the powers of caste groups? Village groups? Do they enhance these powers?

Would a suit against the clients have fared better? Compare Hunnappa v. Hunnanna, Bellasis Reports 8 (S.D.A., Bombay, 1840), where the Court upheld the claim of a hereditary ironsmith of a village against a cultivator for his "bolloottee hucks" [balootie hakk--right to a share]. The trial judge had noted that a refusal to enforce this right would tend to upset a universally acknowledged custom and would endanger the constitution and foundation of all village communities. Plaintiff was entitled to his hucks "according to the rules of the village communities" and if the villagers declined to employ his services, they must still pay him his share. But Cf. Suntoo Wulud Madnak v. Babajee Bin Shriputrow, Morris SDA Bom. (Part 2) 68 (1849) where the Mahars of a village sued the owners of draft bullocks to enforce their rights to the skins of all animals dying in the village where the owners had employed the Mangs of the village to skin the animals and had kept the skins themselves.

The right to serve as a family priest to a particular family was often upheld. See e.g., Mooljee Purseram v. Nagur Ramjee, Sel. Cases 116 (Bombay SDA, 1834).

* * * * *

RAM GUTTREE BISWAS AND OTHERS, Appellants (Defendants) v.
MAHADEO BUNNICK AND OTHERS, Respondents (Plaintiffs).

SUDDER DEWANI ADANLUT, BENGAL
6 S.D.A.R. 64

Present: Aber. Dick, Esq., Sir R. Barlow, Bart., and J. R. Colvin,
Esq., Judges.

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Case No. 112 of 1849

Special Appeal from a decision passed by the Judge of Dacca, July 19th, 1848; reversing a decree passed by the Principal Sudder Ameen of that District, July 2nd, 1845.

This case was admitted to special appeal, on the 21st November 1848, under the following certificate by Sir Robert Barlow:

* * * * *

"The Plaintiffs, in whose favor the judge has given a decree, seek to enforce their claim on a former decree, and to realize 1,100 repees damages, in consequence of the disgrace thrown upon them by the defendants not having presented to them, as is alleged to be customary, certain complimentary offerings on the occasion of some marriages, which had taken place in their families.

"The defendants plead they never did offer any presents to the plaintiffs' ancestor on the occasions alluded to; that by the shasters they were not bound to any such offering; and that no such usage is enjoined by the shasters.

"The principal sudder ameen dismissed the claim. The judge, for the reasons recorded at p. 89, reversed the principal sudder ameen's order.

"This plaint is of a nature hardly cognizable by the courts. If the plaintiffs, or their ancestors, at any former period did receive at the hands of the defendants, or their ancestors, any complimentary presents on the occasion of marriages taking place, such compliments cannot be urged in a court of justice, and create grounds on which to pass a judicial award, rendering it compulsory on a party to obey it. Paunbutta, and the like offerings, are voluntary . . . compliments, which may be withheld at pleasure. . . .

"The case is one of a peculiar nature. I therefore admit a special appeal to try whether the conclusion at which the judge has arrived can be supported by the superior court."

JUDGMENT

Sir R. Barlow and Mr. J. R. Colvin, -- The claim in this case is for the right to be summoned at all marriages, and to receive, when so summoned, a paunbutta, or present of paun, from members of a particular community. This claim is preferred on the ground of a zillah decree, passed by Mooneeooddeen Mohumed Khan, sudder ameen, of 10th July 1837, in which the decretal order was that the defendants should give to the plaintiffs paunbuttas, in the name of Ram Deb Mullick ancestor of the plaintiffs, at all their marriage festivals,



in the assemblages at which the plaintiffs were to be present, and it is supported by reference to a miscellaneous order of this court of 12th February 1835 (present Mr. D. C. Smyth), in which it was directed, as the mode of executing a decree in respect to the privileges of a sirdar of the bearer caste, that an engagement should be taken from the defendants in that case, promising obedience to the decree, or binding themselves to payment of a fine in the event of disobedience.

We are clearly of opinion that a decretal order, upon such a claim, is not capable of regular enforcement. It could not be enforced literally, in the terms for instance in which the above cited order of the sudder ameen's court was expressed; and we are certainly aware of no law, under which the mode of enforcement, referred to in the order of this court of February 12th, 1835,—that is, by way of a compulsory agreement with a condition of fine,—could be upheld.

Besides this, the special appeal to this court can only be upon an usage having the force of law; and it is of the essence of such practices of invitations to festivals, and the giving of presents at such times, that they depend on the voluntary act of the parties who celebrate the festivals, and can have their authority only from the power of all communities to exclude from their society, or peculiar privileges, any persons who do not conform to their usages or rules.

Upon these grounds, we reverse the decree of the judge, and dismiss the claim of the plaintiffs, with all costs.

Mr. A. Dick.—I find, on reference to the records, that the plaintiffs in this case had obtained a decree, acknowledging their hereditary right to the presentation of the paunbutta, which decision had become final from no appeal having been preferred against it. I . . . also find, that the judge referred the case for opinion to arbitrators, who (though not so recorded in the judge's decision) declared that the claim was an hereditary right of plaintiff's family. I find also that similar customary rights, although of other castes, have been recognized by the courts, as cited in the judge's decision. Further, I find that Menu (in Cap. VIII, para. 41) enjoins inquiry into such claims of customs of castes. Lastly, such claims are clearly declared as legal and cognizable by the courts. The point in the certificate, which this court has to consider, is, 'whether the conclusion at which the judge has arrived can be supported?' Now, that conclusion, so far as relates to what is before us, is, that he, 'in concurrence with the opinion of the punchayets, reverses the decision of the



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principal sudder ameen, and decrees to appellants, the heirs and representatives of Sham Deb, the right of presentation by the respondents of paunbutta on their marriage festivals, according to ancient usage.'

This much of the judge's decision I would, on the grounds above stated, confirm, and reject the special appeal with full costs.

Had the judge given even nominal damages, on account of the indignity, as claimed, just sufficient to carry costs, there could have been no difficulty in executing the decree of the court. Even given as it is, it may be executed with regard to the costs. I make no allusion to the mode of execution directed by the Sudder Court in 1835, beyond recording that I do not concur in the propriety or legality of that order.

NOTE: Is the statement of the majority that "such practices . . . depend on the voluntary act of the parties" a finding of fact or a conclusion of law? How about Mr. Dick's statement that this was "an hereditary right of plaintiff's family"? What relevance does Manu have? Is the majority suggesting that plaintiffs can resort to excommunication to enforce this claim? Compare Ramkranth v. Ramlochan Acharj, 1859 S.D.A. 535 (Bengal) in which a Brahmin brought suit for reinstatement in his dul [caste association, faction or coterie]. He sued nineteen members who had accepted his invitation to dine but had refused to attend for the costs of the wasted entertainment and for a declaration of his right to membership. The Sudder Dewani Adawlut dismissed the claim for the cost of food as an absurdity, but considered the expulsion from caste a serious injury and, the trial judge having found the expulsion without just cause, ordered him restored to membership in his dul. This decree was not incapable of enforcement, said the Court, for it could be enforced by a suit for damages should it be infringed without just cause.

* * * * *

LUKHEENARAIN CHOWDHRY (Defendant), Appellant v.
MOHUNLAL DASS, NAIB MOHAFTZ OF THE MIDNAPORE COLLECTORATE
(Plaintiff), Respondent

13 S.D.A.R. 402

The 19th March, 1857.

Present: C. B. Trevor, E. A. Samuells and D. I. Money, Esqrs.,
Officiating Judges.

Case No. 316 of 1854.

Regular Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 4th July 1854.

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The Plaintiff in this case is the naib mohafiz [deputy record keeper] of the Midnapore collectorate, and the defendant is cash-keeper in the same office. The suit is for damages, laid at rupees 10,000 on account of an assault, and the disgrace and indignity therefrom resulting.

[403] The defendant was in conversation with the mohafiz of the collectorate in the public cutcheree, [court] regarding a house, which the former possessed in the town of Midnapore, and which it would seem he was anxious to let. The plaintiff on being questioned by the mohafiz, gave a very unfavorable opinion of the house, declaring it was in a dilapidated condition and unfit to live in, on which the defendant became exceedingly enraged and loaded him with abuse; he, it appears in turn abused the defendant, and in the scuffle which ensued either fell or was pushed down. On getting up the altercation was resumed and both parties had recourse to their shoes, but one of the witnesses throwing his arms round plaintiff prevented him from using his, and the defendant struck him, while in this condition three or four blows on the head with his shoe in the presence of a considerable crowd. The evidence is very meagre, but these appear to be the facts established.

The defendant called no witnesses and does not in his answer directly deny the assault. He maintains, however, that as he is a Brahmin, and the plaintiff a Sudra, the latter cannot be said to have suffered any indignity from the assault, supposing that it took place. On the contrary, he says he ought to feel honored by the notice he has bestowed on him. "I am," he says in his answer, "by caste a Brahmin, and consequently the spiritual preceptor of the plaintiff, and he is my pupil. According to our religion I am in every way an adorable object to the plaintiff, and the dust of my feet is enough to make him happy in this world and the world to come." . . .

The principal sudder ameen . . . finds the assault and battery in this case proved; but looking to the fact that the plaintiff himself was not altogether free from blame, limits the damages to rupees 50, awarding plaintiff however the full costs of the suit.

In appeal it is urged, as before, that a civil action will not lie in our courts for an assault, unaccompanied with injury appreciable in money, and that looking to the relative positions of the plaintiff and defendant in the scale of caste, and the peculiar ideas of the Hindoos on this subject, no disgrace or degradation can result to the plaintiff in the estimation of his fellow-countrymen from the act of the defendant. The court, it is contended, must



have respect to Hindoo usages, in deciding a case of this nature between Hindoos; must consider that these usages give to a Brahmin the privilege of treating a sudra with insult and contumely, and must bear in mind that the Hindoo may regard that as a blessing, which the European would look upon as an insult and a degradation. . . .

. . . [T]o entitle a plaintiff to succeed in an action for damages on account of personal injuries, he must prove both "injury" or legal wrong, and damage appreciable and capable in legal contemplation of being estimated pecuniarily by a court of justice. Mere general terms of abuse, it was held, rather affecting the character of those who used them than of those to whom they were addressed, afforded no ground of action, nor did a mere assault, such for instance as the holding up of a shoe where no battery or other actual damage was alleged, justify a pecuniary award. It is unnecessary for us at present to express any opinion as to the correctness of the ruling in this latter case. The precedent which it furnishes, if correct, cannot, it is manifest, be carried further than we have indicated without a plain violation of the law. The preamble of Regulation III of 1793 declares that the civil courts were established in order that every man might be enabled "to command at all times the exercise of the judicial powers of the State lodged in the courts, for the redress of any injury which he may have sustained in his person or property" and the courts were accordingly empowered by section 8 of the same Regulation to take cognizance amongst other suits of claims to "damages for injuries." Now every invasion of a legal right is an injury, and of all rights none are of more importance than the right of personal security, which is defined by Sir W. Blackstone to be "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation" "to each of which" as Broom in his commentaries on the common law remarks, "he may be said to have a natural inherent right which cannot be wantonly destroyed, infringed, or restricted, without a manifest breach of civil liberty." The damage resulting from injuries of this description may not be perceptible. It may not include either loss of limb or loss of money, but that it is perfectly appreciable in money is proved by the uniform practice of our own courts and those of other . . . countries. Actions for injuries to the person have not been frequent in the courts of this country, (though they are by no means unknown), but kindred cases of injuries to the reputation are very common indeed,



and although consequential damage has already been proved in these cases, our courts have always freely awarded pecuniary damages to the plaintiff, by way of preparation for his wounded feelings, and compensation for the legal wrong he has suffered.

. . . With reference to the plea which has been founded on the peculiar usages of Hindoo society, we will only observe that the defendant has entirely failed to satisfy us that beating a man about the head with a shoe, is a Hindoo mode of benediction, or that the meanest Sudra would consider it otherwise than a degradation to be so treated by a Brahmin in a public cutcheree. What the plaintiff's feelings on the subject are, may be gathered from the amount at which he has laid his damages in this action. We have no doubt that the plaintiff has sustained both legal and social injury from the act of the defendant, and we accordingly confirm the principal sudder ameen's award of damages, against the amount of which no appeal, we may observe, has been preferred by the plaintiff.

.....

We accordingly affirm the decision of the lower court as it stands, and dismiss the appeal with costs.

NOTE: What would Manu have said about the rule in this case? Compare the earlier case of Gobey Dossee v. Gungoram Day, II Morley's Digest 34 (Supreme Court of Judicature, Calcutta, 1820), where defendant touched the cloth of a low caste woman while pointing her out to Court peon who was serving her with a summons (in defendant's assault case against her). The Court Pandit said that even if the touch were intentional, it was not unlawful since she was a sudra while defendant was of [unspecified] superior caste. The Court agreed, adding that it was a lawful touching since defendant was helping the peon to serve the summons.

But low caste status was in itself no bar to a remedy. In Rama Kamshana v. Gour Singh 7 Sel. Reps. S.D.A. Bengal 227 (1845), it was held that a female of good character who appears in public in the Bazar and "who is not of that rank in life which renders her seclusion necessary" may maintain a civil suit for slander against one who has accused her of theft.

A brahmin may enforce a customary right of sitting and receiving alms within a temple, upon a showing that seven generations of his ancestors have enjoyed this privilege, even though some degree of sin attaches to a brahmin who does this. See Sumbhoo Dhuneshwur v. Gooman Bhartee, I Borrad. 144 (Bom. S.D.A., 1814). Suppose a Brahmin is engaged in the liquor trade, a very sinful activity. May he sue his partner for a rendering of accounts? In Jye Narain Mokerjee v. Bul Ram Raj, 4 Sel. Rep. S.D.A. Bengal (1825) the Pundits said that although it is not proper for a brahmin to trade in wine, if two brahmins acquire wealth in a prohibited manner, they take equal shares. The Court agreed, finding that the punishment of Brahmins for such an offense was not a matter for consideration of a civil court.



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DASEKA IYENGAR, AND OTHERS Special Appellants, v.
GUNTAVATARA IYENGAR, AND OTHERS Special Respondents
SUDDER UDALUT (MADRAS)

1858 S.U.D. 256

Special Appeal from the decree of the Principal Sudder Ameen of
Cuddalore, (M. Jaggah Row) in Appeal Suit No. 64 of 1854.

The parties in this case are ministering servants in the pagoda of Devanadhasamy, at Teroovendipoorum. The plaintiffs brought their action for their shares in certain emoluments, and also for an injunction restraining the defendants from introducing a novel practice in the course of their functions whereby they (plaintiffs) were aggrieved, and for which they sought pecuniary compensation.

In respect of the "shares" in question, the decree below is acquiesced in by the parties. As to the use of the trumpet, the moonsiff was of opinion that defendants could not be allowed to employ it, though he disallowed the damages claimed; and on appeal, the principal sudder ameen having decided "that the blowing of a 'Teroochunnum' or trumpet, or the use of any musical instrument at the time of crowning the defendants with the 'Sadagopam,' whether at the commencement or conclusion of their ministration, is an unwarrantable innovation on the established and ordinary ritual of which plaintiffs have a right to complain and by which they would be aggrieved and endamaged in their feelings and honor," awarded that such practice be not used in future, and that defendants should pay the four plaintiffs at the rate of two rupees each on their own accounts, and also at the same rate on account of the twenty other individuals for whom they declared they appeared as equally offended, and injured.

.....

Mr. Branson [for the appellants] endeavored to show that in matters so entirely relating to ceremonial observance, unconnected with substantial rights or advantages, the courts had not been in the habit of exercising any jurisdiction, and were acting accordingly, he confined himself to the question whether such jurisdiction was actually vested in them and legally exercised, and whether, the past notwithstanding, they were not bound to forbear exercising it in future, upon discovering that they had hitherto acted ultra-vires.

.....

At the conclusion of the argument, a difference of opinion existing on the bench, the Judges proceeded to deliver their judgments seriatim as follows:

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Opinion of C. R. Baynes, Esq..

"I cannot think the Legislature intended to leave disputes of the nature we have been contemplating without a tribunal for their decision: indeed I have always supposed that such duty was expressly imposed on the civil courts, by the letter and spirit of the law. I have never heard the fact doubted or questioned till now, and I have now heard nothing to shake my opinion. If it be said that the jurisdiction might have been more expressly given, I answer that it is sufficient if the terms employed will carry it, and that there is certainly nothing prohibiting its exercise which we might reasonably expect to find if the legislature designed to inhibit the courts from entertaining such suits. Nor, even allowing, for the sake of argument, that a doubt might have been suggested on the publication of the law in 1802, am I disposed to value so lightly as has been suggested, the force and authority of an interpretation and practice which has ever since subsisted. On the contrary, I consider that if there be place for doubt in the matter itself, it is, and ought to be, set at rest for ever by that very fact. In short I see a law which, in my judgment, gives room to the jurisdiction in question. I see that such has been always exercised in the view of the legislature; that it has never been challenged; that all parties concerned have, as a matter of course, resorted to it and been satisfied with it. I feel therefore that it is in every sense legally upon us, and that we cannot now, if we would, repudiate it and divest ourselves of it. I would therefore confirm the decree of the appellate court in the case before us, save in so far as it directs the payment of damages to the twenty-three individuals who were not actually parties to the suit, and distribute the costs accordingly; ordering special appellants to pay costs in this appeal."

Opinion of T. L. Strange, J.

"The matter in issue before us is one of pure ceremonial usage affecting the ritual of a Hindoo pagoda. The question is whether we have any jurisdiction in such a case.

"I will first address myself to the practice of the courts in analogous cases, as referred to by the pleaders on either side.

"The decisions given by us in appeal suits 18, 51 and 74 of 1853, 97 of 1855, 146 of 1856, and 30 and 73 of 1858 are not exactly relevant. The claims involved in these cases were in each instance for exercise of certain offices, carrying with them emoluments, and there can be no question, whatever considerations of religious usage may have been embraced in these suits, the



plaintiffs, in prosecution of their rights to the emoluments at stake, had fair ground of appeal to the civil tribunals.

"There are, however, also suits of the complexion of the present one in which the Court have indubitably held that they have jurisdiction. These I will enumerate, appeal 28 of 1841, in which the reading of a particular muntrum was in question. Appeal 7 of 1837, involving the right of a particular caste to wear shoes and whitewash their houses. Appeal 54 of 1849--the right of having an idol stopped to make offerings thereto. Appeal 50 of 1851--the right to priority in receiving betal. Appeal 55 of 1853--the right of setting up public worship of idols on the private ground of those so doing. Appeal 30 of 1854--the right of priority in receiving teertum, and Appeal 139 of 1856--the right to reception of a garland.

.....

"In certain of the above cases the question was raised whether the Court had the jurisdiction it was called upon to exercise, but in each instance this was disposed of in a very summary way, without argument. Since I have been in the Court the present is the first occasion on which the matter has been properly discussed,"--

"My opinion is that we have no such jurisdiction. It is not enough to say that we have it, because there is no other place of resort for adjustment judicially of disputes of the description. The dissenting bodies in England have no tribunal to appeal to for settlement of ecclesiastical questions arising among them. They are left to apply remedy themselves. The ritual observance of the Church of England are guarded by special law, administered by special tribunals. The civil courts have no more jurisdiction in the behalf of the Church of England in such matters than they have in respect of the dissenters. The conclusion therefore is plain that the civil tribunals, as such, have no natural jurisdiction in matters purely ecclesiastical.

"I am fortified in this opinion by what has passed before Her Majesty's Privy Council in the only instances wherein questions of religious usage arising in India have come before them.

.....

"It is certainly true that this question of jurisdiction was in the above manner left undecided by their Lordships, but it is equally plain that had it naturally belonged to courts having cognizance merely of civil rights, no doubt on the possession of the courts in India of this jurisdiction would have arisen in their Lordships' minds, and the very pointed terms in which they



guarded themselves from the supposition that they held that these courts had the jurisdiction would have had no place in their judgment.

"We are cast then by the nature of the jurisdiction, and by their Lordships' observations in the above cases, upon the consideration whether in our code of laws any special authority has been conferred upon us in matters connected with mere religious ritual or usage unassociated with civil rights.

"Regulation II of 1802 is the act upon which the jurisdiction of the civil tribunals depends. It is entitled 'a regulation for establishing and defining the jurisdiction of the Courts of Udalut, or Courts of Judicature.' Section V, describes the cases over which such jurisdiction may be held. The courts are thereby empowered 'to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally of all suits and complaints of a civil nature.' The last clause, it appears to me is obviously to govern all that precedes it. That is the claims falling to the cognizance of the courts are to be such only as involve invasion of civil right. Here there is no specification of a peculiar authority lifting the courts in India out of and beyond the limits belonging to all other civil tribunals elsewhere. On the contrary, their position is declaredly that of civil courts in general, and none other.

"Clause 1st, Section XVI, Regulation III of 1802, has been supposed to give the extended jurisdiction we are called upon to put in force in this suit. It is necessary therefore to examine this regulation. It is not one the end of which is that of 'defining the jurisdiction' of the courts as the preceding one has been found to be. It is therefore not an enactment extending the jurisdiction. It is a regulation declaredly 'for receiving, trying, and deciding suits or complaints, declared cognizable in the Courts of Udalut.' It is thus merely a code of procedure to regulate the manner of trying and deciding the suits already declared cognizable by the previous regulation, and does not provide for the reception, and trial of any that may be of any other character. Accordingly, in Section III, in describing what the plaint is to contain, exactly the class of cases, one by one, is specified which enter into the definition of jurisdiction in Regulation II, and none other. We then pass on to the clause and section placed by me at the head of this para. The object being still procedure, and that only, it is said, 'In suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which the judges are to be considered as the general rules by which the judges are to form their



decisions.' I have maintained that the governing clause in the enactment defining the jurisdiction of the courts is the last, whereby no claim is to be entertained but such as may involve a question of civil right. Among the class of cases embraced in the definition are such as may relate to marriage and caste. These obviously involved, as the law then stood, rights to property. If the marriage were one void in law, the derivation of property under the marriage would fail. If the person had lost his caste, his right of succession to property according to the then state of the law, would be gone. Again, there would be questions of adoption, on which participation in civil rights hangs. In deciding upon the soundness of all these positions, that is, the soundness of the marriage, of the caste, or of the adoption, it is plain that consideration of the 'religious usages and institutions' of the people largely enters. The regulation which I have termed descriptively the code of procedure takes up therefore the necessity of the case as here arising, and points to the Mahomedan law as the guide in all such matters between Mahomedans, and the Hindoo law as between Hindoos. The clause and section in question obtain thus a full and satisfactory application to the previous rule of definition of jurisdiction without straining or stretching the terms of the definition in any one particular. This then I maintain is the sole application to which that clause can be put.

"I further hold not only that our code of law gives no specific jurisdiction to the civil courts in matters such as we now have before us, but that the terms of the law in the non-specification of such jurisdiction effectually exclude it. If it had been intended that the courts should try all questions of religious usage, why I must ask, was this not declared when the subject was approached in placing questions of marriage and caste within the scope of their powers? I conceive no other proper answer can be given than that in connection with the religious usages and institutions of the people the courts were to have jurisdiction only in matters of succession, marriage, and caste, or wherein in any way civil right might be invaded.

"My opinion thus is that we should abstain from granting the injunction prayed for, as being a matter beyond our jurisdiction.

Opinion of G. S. Hooper, J.

"My opinion clearly is, that we have jurisdiction in this case, as in all cases of a similar nature, under the letter as well as the spirit of the law



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which has hitherto regulated our judicial proceedings, and that we are bound to exercise it, as the civil courts have undoubtedly done in innumerable instances during the last 50 years, without their jurisdiction ever having been doubted or called in question.

"I see no reason to doubt the correctness of the interpretation hitherto given to Section V, Regulation II of 1802, supported and strengthened as it is by the more comprehensive wording of Section XVI, Regulation III of 1802, and upon which our courts have acted; and I do not see how we can now adopt a different interpretation and practice, and refuse to adjudicate in such matters when brought before us.

"Whether or not it is expedient or advisable that an enactment should be passed expressly to exclude all matters relating to ceremonial usage and ritual observance from the jurisdiction of the civil courts, and to provide or point out some other mode of deciding them, is another question. I must say that, in my opinion, such matters would be more properly settled in some other way than through the agency of the civil courts; but while the law remains as it is, and parties have no other place to resort to for the settlement of such disputes, the said courts are, I think, bound to take cognizance of them.

I concur, therefore, in the decree proposed by Mr. Baynes to be passed in this case."

Judgment

Decree of the appellate court affirmed, save in so far as it directs the payment of damages to the twenty-three individuals who were not actually parties to the suit; and distribution of the costs accordingly; the special appellants paying all the costs in this appeal.

15th December 1858, No. 125 of 1858.

TIRUMALAI TATA CHARITY AND ANOTHER, Special Appellants, v.

RAGAVA CHARITY AND OTHERS, Special Respondents

SUDDER UDAMLUT, MADRAS
1861 S.U.D. 152

Special Appeal (No. 94 of 1861) from the decree of the Officiating Civil Judge of Chingleput (G. F. Fullerton), in Appeal No. 84 of 1860.

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The plaintiffs are of the Tengale caste and the defendants of the Vadagale, and are worshippers together in the same pagada at Conjeeveram. The suit has been brought to regulate the ritual of the pagada service on which, being of opposing sects, the parties are at issue. The particular grounds of contention, as described by the acting civil judge, are at what time the plaintiffs may join the defendants in the recitation of a prayer; which of the plaintiffs is entitled to do so; whether the Tengel priest is entitled to a blessing to be pronounced at the conclusion of the prayer; whether a hymn may be sung in his honor; whether certain festivals called birth star festivals are to be kept; and whether the images may be taken out in procession.

.....

The Court have given that decision [Baseka Ivengar v. Guntavata Ivengar, above] and the arguments of counsel upon the question their careful consideration, and the opinion at which they have arrived is that they possess no jurisdiction to warrant their pronouncing judgment upon subjects such as are now in issue. They feel, to adopt the language of the present civil code of procedure* that their authority extends only to the "cognizance of suits of a civil nature;" and it is obvious to them that the present suit is not of that description. It required, in the parent country, the creation of a special tribunal to undertake to regulate mere religious usages, unassociated with contract, and the operations of that tribunal has been confined to the protection of the interests of the form of worship of the state. The Court have had no such special powers conferred upon them. They are in the position of the ordinary civil tribunals of the parent country, whose want of such powers led to the erection of the ecclesiastical court to which reference has been made, and the form of worship of the parties to this suit is not even that which is followed by the state.

Believing thus that they are precluded by absence of authority from entering upon the questions involved in this suit, the Court resolve, in reversal of the decrees below, to dismiss the suit with costs.

20th November 1861

* The Code of Civil Procedure was enacted in 1859--after the decision in the previous case.



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I - 31

STRIMAN SADAGOPA v. KRISTNA TATACHARIYAR

HIGH COURT AT MADRAS
1 Mad. H.C.R. 301 (1863)

Appellate Jurisdiction. (a)
Regular Appeal No. 12 of 1862

This was a regular appeal against the decree of A. W. Phillips, the Civil Judge of Chingleput, in Original Suit No. 2 of 1861.

The plaintiff, the gurukkal (b) of Cri Ahobalam Matham, sued the defendants, the wardens of the pagoda of Cri-Devarajasvami at Conjeeveram, for damages for injury done to him by withholding from him certain honours and emoluments, and also sought to have his right to such honours and emoluments established for the future.

The honours were specifically enumerated in the schedule annexed to his plaint and marked A, and the emoluments in the schedule marged B. The plaint alleged that from time immemorial, the predecessors of the plaintiff, and the plaintiff himself during his tenure of office, were entitled to and received those honours and emoluments from the dharmakarttas of the pagoda of Devarajasvami at Conjeeveram and from the worshippers at that pagoda; and that while the pagoda was in the hands of Government such honours and emoluments were awarded under the authority and order of the Collector for the time being. In the month of Vaikasi (May-June) of the year raudri (A.D. 1860) the plaintiff informed the defendants of his intention to proceed to the annual festival of Devarajasvami at Conjeevaram and called upon them to receive him with the honours and emoluments due to his rank. The defendants promised to do so, but by various false excuses delayed to comply with his demand, and after the plaintiff had waited at their request from the 21st day of Vaikasi to the 10th day of Purrattasi (September--October) finally failed to receive him in the manner to which he was entitled and in which they had promised to receive him.

[The Honours listed in Schedule A included such matters as garlands, cocoanuts and sandalwood to be presented to the guru, a silk cloth to be tied around his head, food of various kinds, and fireworks to be provided when he was carried in procession. The emoluments in Schedule B amounted to nearly 25,000 rupees. This included Rs. 14,300 for Plaintiff's expenses during the period of the festival, Rs. 10,000 damages for loss of dignity,

- (a) Present: Scotland, C.J. and Frere, J.
(b) The honorific plural of guru, "spiritual teacher or guide."

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and Rs. 327 as the value of the various garlands, coconuts, clothes, rockets, etc.]

Scotland, C.J.:--I think enough appears to warrant our deciding the case upon the plaint, and I am of opinion that the Civil Judge's decision is right. This case is not in its circumstances the same as Special Appeal No. 94 of 1861, [Tirumalai Tata Chariar v. Ragava Chariar, above]. There the suit was simply for the regulation of the ritual of the pagoda as connected with certain observances of religious worship, and no claim was made or question raised as to the value of offerings or in respect of any pecuniary damages sustained. In that decision I entirely concur; and should at once follow it without saying more, were the circumstances of this case precisely similar. But there is this difference, that here the plaintiffs claim includes under the head of "emoluments" a number of items to each of which a money value is attached, and one or two of which appear not to be of a perishable nature; and besides these, there are to be sums of considerable amount claimed for loss or dignity and the expenses incurred in the ceremonials connected with the plaintiff's visit. And the question is whether these circumstances so distinguish the present case as that the principal and reason upon which the former decision properly rests cannot be held to affect the plaintiff's right to proceed in this suit.

After giving the point and the arguments my best consideration, I have come to the conclusion that we can make no such distinction, and that the matters of claim here are not of such a civil nature as entitle the plaintiff to maintain a civil suit. We must first consider what is the nature of the subject-matters in respect of which the plaintiff seeks to recover as damages the money-items particularized in the plaint. By merely affixing a money-value, the plaintiff of course cannot give himself a right to sue which he does not otherwise possess. Now though the word "emoluments" as well as the word "honours" is used in the plaint, and doubtless ordinarily means temporal gains, profits and advantages, in respect of which a right to bring a civil suit clearly exists, yet we must look in this case to the items of claim in the schedule to which alone the word applies, and these clearly shew that every one of the matters in respect of which the suit is brought, is purely a matter of religious and sacred observance in connection with the worship and ceremonials at the pagoda, and is claimed by the plaintiff as a matter of devotional respect and display due to his priestly rank or as a votive offering made to him whilst



passing in procession through the temples, and when brought to the presence of the principal idol. Furthermore, it appears and is admitted that the office of 'gurukkal' relates to the Hindu religion generally, and that all the offerings and devotional honours are claimed at this pagoda in common with those at other pagodas which the plaintiff might choose upon occasion to visit. He is not officially connected in any way with the management or control of the pagoda, or its property of funds; and the alleged dues of the office have no doubt been owing to the great reverence at one time entertained for his sacerdotal rank in the Hindu religion, and the importance from a religious point of view of his mere presence at the pagoda. But this would seem now to have become quite otherwise; and certainly the plaintiff's right to bring a civil suit ought to be very clearly established before we reverse the decision of the Court below. Substantially, as it appears to me, all the honours and emoluments in respect of which damages are sought, are in themselves matters purely of religious ceremonial and devotional observance, and are connected with a priestly office, which, as regards the dharmakarttas and worshippers at the pagoda in question has attached to it no other claim of right than that which rests upon the religious feelings which they, in common with other Hindu worshippers, entertain for the sacred position of the plaintiff. Such honours and emoluments cannot in any respect be considered as remuneration for duties or ministrations performed by the plaintiff in the secular affairs or religious services of the pagoda. Nor can it, I think, be said that the defendants as trustees of the pagoda-funds are compellable in law to expend those funds in defraying the costs of those honours and emoluments.

There is no doubt that the Civil Courts will recognize and enforce the rights of persons holding offices connected with the management and regulation of pagodas; and if the holder of such an office were entitled to remuneration for his services in the way of salary or otherwise, he would have a civil right entitling him to maintain a suit, if that remuneration were improperly withheld. So, too, suits are commonly entertained for the purpose of trying and deciding who are fit and proper persons of right entitled to be appointed dharmakarttas of a pagoda. In such cases it will be found that the offices of a secular character and are so dealt with, though religious duties are attached to them--the occupants being employed to exercise business functions, either as trustees and managers of the property and funds of the pagoda, or as overseers



in the regulation of its affairs generally, and having necessarily civil rights and liabilities which may properly be made the subject of a civil suit. But nothing of this kind can be said of the plaintiff in his purely religious office of guru. The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature. Of such obligations the present Civil Courts cannot take cognizance. And it is of great importance, I think, in this country, that the Court, exercising their civil jurisdiction as now provided, should carefully guard against entertaining suits in respect of mere ritual observances and the conduct of the various kinds of native religious worship and ceremonies, and of what as incident thereto may be due to the sacred character or the religious rank and position of individuals. With such matters the Courts cannot properly deal, and if their jurisdiction extended to interference in them, the law would, I fear, be made instrumental in upholding and continuing the ceremonials and superstitious observances of idol-worship, for the benefit merely of the few who profit by them.

Being, then, of opinion that the subject-matter of the present suit is purely religious, and relates to the sacred office of the plaintiff, and as no connection with any rights that can properly be considered as being of a civil nature, I think this is not a suit of such a civil nature as by the first section of the Code of Civil Procedure, the Civil Courts are required to take cognizance of, and that the Civil Judge was right in rejecting the plaint.

The appeal must therefore be dismissed.

Frere, J., concurred.

Appeal dismissed.

NOTE: How would you describe the shift in the position of the courts from Daseka Iyengar to Striman Sadagopa? What effect might each position be expected to have on Hinduism? Does the later position portend less state intervention in religious matters? More freedom of religion? Greater possibilities of innovation?



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THE UNIVERSITY OF CHICAGO

The College

Introduction to the Civilization of India

LEGAL MATERIALS FOR THE STUDY OF MODERN INDIA

Compiled and edited by

Marc Galanter

PART II

Law and Caste from the Consolidation of the Modern

Legal System to Independence (circa 1860-1947)

Spring, 1965

Chicago . Illinois

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Part II

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PART II

Law and Caste from the Consolidation of the Modern

Legal System to Independence (circa 1860-1947)

The British Crown took over the Government of India from the East India Company in 1858. The following quarter century saw the codification of law and the consolidation of the court system. Beginning with the Code of Civil Procedure in 1859, the Code of Criminal Procedure in 1860 and the monumental Indian Penal Code in 1861, a series of Codes was enacted, based more or less on English law, which were with only minor exceptions applicable throughout British India and which supplanted all prior law. By 1882 there was virtually complete codification of all fields of commercial, criminal and procedural law. Only the "personal laws" of Hindus and Muslims were exempted. But Hindu and Muslim laws were now confined to the "personal law" matters (family law, inheritance, succession, caste, religious endowments). At the same time the dual system of courts was abolished and the jurisdiction of the Supreme Courts in the Presidency Towns and the Sudder Courts in the moffussil were united in a single high court in each province (1861). A unified hierarchy of courts now applied the same law to all parts of each province. By 1864 the last of the law officers (Pandits and Moulvis) who had ascertained Hindu and Muslim law for the judges were abolished. The common-law judges now applied Hindu, Muslim and customary law without consulting any intermediaries.

In the following set of cases, we shall be looking at some of the ways in which this consolidated "modern" legal system dealt with the institution of caste. We shall look at the regulation of (1) disputes within castes and (2) disputes between castes.

You will recall that the Bombay Regulation of 1827 excluded "caste questions" from the Courts. This was made general throughout British India by the Civil Procedure Code of 1859.



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II - 2

ANANDRAV BHIKAJI PHADKE v.

SHANKAR DAJI CHARYA

BOMBAY HIGH COURT

I.L.R. 7 Bombay 323 (1883)

West and Nánábhái Haridás, JJ.

The Judgment of the Court was delivered by West, J.

This was a second appeal from the decision of G. Druitt, Assistant Judge of Thána, confirming the decree of M. N. Nánávati, Subordinate Judge (Second Class) of Bassein.

The facts of the case are as follows:--

The four plaintiffs were members of the Chitpávan caste of Maráthi Bráhmans residing at Agáshi, in the Bassein Táluka of the Thána Collectorate. The thirteen defendants were members of the caste of Palshe Bráhmans residing at the same place. The plaintiffs alleged that the temple of Bhavánishankar at Agáshi was built by a Bráhman of their caste a hundred years ago; that, according to the intentions of the founder, certain classes only of Bráhmans were permitted to enter, and were in the habit of entering, the gábhára, or inner shrine of the temple, and performing worship there, viz., their own class of Chitpávans, the classes of Bráhmans who took food with the Chitpávans, and Gurjar Bráhmans, and that the defendants, although not belonging to any of the privileged classes, on the 1st of August, 1871, and thereafter on several occasions, did enter the said part of the temple and perform worship there to the injury of the plaintiffs. The plaintiffs accordingly prayed for a decree declaring their exclusive right to perform worship in the gábhára, and for an injunction restraining the Palshe defendants from going or worshipping there, or otherwise interfering with the plaintiffs in the exercise of their said exclusive right. The suit was brought in 1876.

.....

[The Subordinate Judge found against the plaintiffs on the ground that their suit was barred by the statute of limitation. The Assistant Judge, however, held that the suit was timely but that plaintiffs had no standing to sue on behalf of a large and indeterminate class of persons. Here the High Court has decided both of these preliminary questions in plaintiffs' favor and now proceeds to the merits of the controversy.]

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Then it is said [by defendants] this is a caste question excluded from the cognizance of the Civil Courts. The meaning of section 21 of Regulation II of 1827 is that the internal economy of a caste is not to be interfered with by the Courts, not that no possible matter of litigation in which a question of caste usage, or right, or privilege may arise can be taken cognizance of. The proper and indispensable limits of the cognizance of religious and caste questions by a secular Court are indicated by Sir T. Strange:—"A British Court exercising ever the most delicate caution not to meddle with matters of religion, but and in so far as it happens to be inseparable from the question of right; upon which alone, as it concerns property, or the civil duties of life, it is its proper function to adjudicate."¹ See also the opinion at page 263, Volume II. And this corresponds pretty nearly in principle to what in England has been laid down, and acted on, with regard to dissenting religious bodies not disapproved, but also not sustained, or regulated, by the State—Cooper v. Gordon.² The English Courts have to adjudicate amongst sections of dissenters as to civil rights, though they have no authority in what may, by analogy, be called caste questions. The principles set forth in the case of Brown v. Curé of Montreal³ are of general application, and, should the necessity arise, would warrant the Civil Courts in going much further than they are called on to go in the present case. Now the rights connected with the religious foundation, in the absence of any code of rules laid down by the founder or the sovereign power, have to be sought in the practice of the institution. What has long been done is presumed to have been rightly done. The evidence on that subject has led the Assistant Judge to the conclusion that the right of exclusive worship set up, as against the defendants, by the plaintiffs has been proved, and that the contradictory right set up by the defendants has not. This right is one which the Courts must guard, as otherwise all high-caste Hindus would hold their sanctuaries, and perform their worship, only so far as those of the lower castes chose to allow them. We, therefore, reverse the decrees of the Courts below, and award the relief sought, with all costs, to the plaintiffs.

Decree reversed.

¹ Strange's Hindu Law, Vol. I, p. 93 (3rd ed.)

² L. R., 8 Eq., 249

³ L. R., 6 P.C., 157 [(1874)]. A leading case in which the Privy Council held that a court might enjoin a Curé who refused to give ecclesiastical burial to a parishioner who belonged to a censured literary society. Even if the Roman Catholic Church was "merely a private and voluntary religious body" the courts should inquire into the laws and rules of that body to ascertain whether denial of rights in a matter of "mixed spiritual and temporal character" was in accordance with those rules. Here found that deceased had never been excommunicated or under valid ecclesiastical sentence that would justify denial of ecclesiastical sepulchre to his remains.]



Note on the Judges: Sir Raymond West, M.A., LL.D., I.C.S., Bar--a--Law, was "one of the most esteemed and erudite judges of the Bombay High Court. . . . [and] exceptionally learned in Hindu Law. His Digest of Hindu Law, written in collaboration with Professor Buhler, who was at the time professor of Sanskrit in the Deccan College, Poona, was long regarded as authoritative." P. B. Vachha, Famous Judges, Lawyers, and Cases of Bombay (Bombay, 1962) pp. 73-4.

Nánábhái Haridás, educated at Elphinstone Institute (later Elphinstone College) a court translator in the old Supreme Court at Bombay, one of the first graduates of the newly established Bombay University, and a noted appellate lawyer before the Bombay High Court, was the first Indian to be permanently appointed a judge on that court.

Is the result here consistent with that in the last two Madras cases? Is there a "civil" or "property" question present in this case that was not present there?

Why is the Court concerned about protecting the sanctuaries of high castes from intrusions by low castes? Has the Court found that Chitpavans are "higher" than Palshes? Does it really make any difference to the outcome of the case? Does the outcome turn on an unstated theory of pollution or on the rules of the religious foundation? Is the Chitpavans exclusive right based on Hindu law? Custom? English law? Does the right of exclusion depend on the special character of this temple? Of temples or religious institutions in general?

Would the rationale of Anandray apply to the exclusion of a polluting individual, even if of the proper caste status? See Vankatachalapati v. Suddarayudu, [I.L.R.] 13 Mad. 293 (1890) where a Brahmin who had married a widow sued to enforce his right to enter the inner precincts of a temple. The court refused to enforce his claim on the ground that the right to use the temple was not an individual right "but a joint right to be exercised in a religious institution conformably to caste usage. . . ." This, it was said, is required by the principle of neutrality in religious matters which forms part of the British judicial system.

Compare Saklat v. Bella, 53 I.A. 42 (Privy Council, 1925) where worshippers at the Parsi temple in Rangoon sued to enjoin the daughter of a convert to Zoroastrianism from entering the temple and participating in religious services. The Privy Council agreed with the plaintiffs that the temple trust was for the benefit only of racial Parsis (rather than all who professed the Zoroastrian religion). However it refused to issue an injunction on the ground that since she was a Zoroastrian, her presence would not be the intrusion of an unbeliever into a place of religious worship and therefore a substantial interference with the worshippers. The court then distinguished the Anandray case as follows:

" . . . if it were a question of caste and worshippers of a higher caste would be defiled by the presence of a lower caste, as in Anandray Bhikaji . . . this would be a serious disturbance. . . . what may be called the quasi-caste claim is not even suggested in the pleadings.

It may be that in India it would be convenient in some cases to allow such a suit [by beneficiaries of a trust against an intruder for trespass] and [the Anandray case]. . . may form a precedent. But if so the circumstances must be as powerful as in that case. It must be established that the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the temple entails the departure of the other, so that it is as it were trespass to the person." pp. 56-7.



* * * * *

The Judicial Committee of the Privy Council in London heard its first appeal from India in 1799. But it was only in the latter part of the 19th century that the council began to get many appeals from India. After 1833 two retired Indian judges were appointed as non-voting Assessors to the Judicial committee. In 1908 they were made full-fledged members. Appeal was technically to His Majesty in Council and since they were exercising the King's prerogative, the Committee's judgment was given in the form of advice to the King. Unlike other courts, "the report of the Committee never took note of any dissentient opinion among its members; only one decision was pronounced. . . ." and, unlike other English courts, it did not consider itself bound by its previous decisions.

An eminent contemporary legal scholar concludes that:

India has every reason to feel grateful to the Privy Council for the role that it played in developing, moulding and shaping the laws. At a time when there was no link between the various Sadar Courts, Supreme Courts and High Courts in India, and when they could interpret the law differently from one another, the Privy council provided a unifying force, a connecting link between them. The principles of law laid down by this august body were regarded as binding by all the Courts in India, and in this, a jurisprudence applicable to the whole of British India began to evolve. And if today, India is fortunate in enjoying a uniformity in the fundamental laws, it is to a very great extent due to the common ultimate Court of Appeal in the Privy Council. M. P. Jain, Outlines of Indian Legal History (Delhi, 1952) at 385.

There was no common court of appeal from the various high courts sitting in India until the Federal Court, established under the government of India Act, 1935, began work in 1937. However, this was not a general court of appeal; its jurisdiction was limited largely to cases arising under provisions of the 1935 Act. The Privy Council continued hearing Indian appeals until 1959. Though its judgments were generally followed by all courts in British India, the impact of the Privy Council as a unifying force was limited by the remoteness of the Council and the expense and long delay of appeals.



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:II - 6

SANKARALINGA NADAN AND OTHERS, Appellants; and
RAJA RAJESWARA DORAI AND OTHERS, Respondents

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

35 Indian Appeals 176 (1908)

On Appeal from the High Court at Madras.

Present: Lord Robertson, Lord Atkinson, Lord Collins,
Sir Andrew Scoble, and Sir Arthur Wilson.

Appeal from a decree of the High Court (February 14, 1902) affirming
a decree of the Subordinate Judge of Madura (East) dated July 20, 1899.

The suit was brought by the Rajah of Ramnad, as the hereditary trustee
of the Hindu temple of Meenatchi Sundareswara, situate in the town of Kamudi,
for a declaration that the members of the Shanar community are not entitled
to enter the temple, and for an injunction restraining them from doing so and
for a sum of Rs. 2500 as damages. The defendants were Shanars and were sued
as representing the whole community of Shanars, resident in or about Kamudi,
under Civil Procedure Code, s. 30. The defendants pleaded, inter alia, that
the members of their community have a right to the use of the temple and to
participate in the worship therein. The Subordinate Judge made the declaration
and injunction prayed for and awarded Rs. 500 as damages. On appeal the High
Court affirmed the decree with costs.

The findings of the Subordinate Judge were as follows:--(1.) That the
Nadars were not a distinct and separate community from the Shanars, whose
hereditary occupation was the cultivation of the palmyra tree and cocoanut
palm, and the extraction and manufacture of their juice; (2.) that persons
belonging to that class were prohibited from entering the plaint temple by the
rules of worship therein observed; (3.) that a custom was proved excluding
Shanars from entering the said temple; (4.) that the acts of sacrilege alleged
to have been done by the appellants on May 14, 1897, were not done by them,
and that the plaintiff's case was in this respect false; (5.) that the Civil
Courts could take cognizance of the present suit; (6.) that in consequence of
the entry into the temple purification was necessary, and that the defendants
ought to pay Rs. 500 for this purpose.

While the appeal was pending before the High Court, and on July 23, 1901,
a petition, signed by the plaintiff and the appellants, was preferred on behalf
of the latter, stating that the parties had effected a compromise of the matters
in suit, and praying that the compromise might be recorded and a decree passed

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in accordance therewith. The agreement of compromise, a copy of which was annexed to the petition, was to the following effect:--"First, the plaintiff shall not exclude the defendants and their caste people from exercising their right of free access to and of worshipping in the said temple of Kamudi, but shall allow them to enjoy and exercise their said right of free access and worship in the same manner and to the same extent as such rights are enjoyed by Vellala, Chetty, and other Sudra sects of the Hindu community. Secondly, the defendants shall enjoy and exercise their said rights in the same manner and to the same extent as the aforesaid sects of the Hindu community enjoy them, and that they have no higher rights of access and worship in respect of the temple, and that the defendants are not liable to pay the plaintiff any sum of money by way of damages; and, thirdly, each party shall bear their own costs of the suit and the appeal. It is further agreed that the plaintiff and the defendants shall present a joint petition or petitions to the High Court, praying that the said decree on the file of the Subordinate Court of Madura (East) be reversed, and that a decree should be passed in accordance with the terms of this agreement."

Thereupon two of the worshippers of the temple in question, and also the infant son and heir apparent of the original plaintiff, by his mother and next friend, were joined as party respondents to the appeal, in order that they might oppose the petition of compromise, to which they took various objections which were stated in the evidence filed in support of their applications.

When the petition of compromise came on for hearing it was supported by the appellants alone, and opposed not only by the newly-joined plaintiffs, but also by the original plaintiff, who expressed the desire to withdraw from the compromise. The petition was dismissed on the ground that the agreement of compromise put forward was not a lawful agreement or compromise within the meaning of Civil Procedure Code, s. 375. The learned judges said:

[All of the material in quotes which follows is taken by the Privy Council from the Judgement of the Madras High Court.]

"It has been judicially established before the Subordinate Judge that the defendants 'belong to a class which under custom and the shastras are prohibited from entering the plaint temple," and that their having done so caused defilement, which necessitated the purificatory ceremonies.

"That finding is binding on the plaintiff as well as on the defendants, and he cannot take upon himself to say 'I have made further inquiries. I am satisfied that the finding of the Court is wrong. I shall, therefore, allow the Shanars to enter the temple.'



"To do this would be to ignore and alter the fundamental character and uses of the temple as ascertained by judicial authority. It is not in the power of the trustees to do this. This principle was laid down by Eldon L.C. in the case of Attorney-General v. Pearson. . . .

". . . [W]ith reference to the regulation of religious trusts in England . . . but we apprehend that, mutatis mutandis, the Court will be guided by the same principles in this country. Where an institution exists for the purpose of religious worship, but the exact form of worship, or the class for whose benefit it was established, cannot be discovered from the instrument creating the trust, or where, as in the present case, there is no such instrument, the Court can find no other means of deciding those questions than through the medium of an inquiry into what has been the usage of the worshippers in respect thereto, and, if the usage is a lawful one, it is the duty of the Court to support that usage on the suit, legally instituted, of any person interested. It is not in the power of individuals having the management of the institution to alter the purpose for which it was founded, or to say to the other worshippers, 'We have changed our opinions, and you, who resort to this place for the purpose of worshipping in the customary manner, shall no longer enjoy the benefit intended for you unless you conform to the alteration which has taken place in our opinions, even to the extent of submitting to the presence of other worshippers who are prohibited by custom and the shastras from entering into the temple.' It is not in the power of any trustee to say this to the other worshippers in a temple. On the contrary, it is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so he is, in our opinion, guilty of a breach of trust, and still more so if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it.

". . . In view, then, of the finding of the Subordinate Judge that the Shanars are prohibited by custom and by the shastras from entering the plaint temple, we must hold that the proposed compromise by the first plaintiff involves a breach of trust on his part, and is therefore not a lawful compromise within the meaning of s. 375 of the Code of Civil Procedure."

The High Court thereafter dismissed the appeal, finding that "there can be no doubt that the evidence adduced by the plaintiffs as to the custom of the plaint temple is far superior in weight and credibility to that adduced by the defendants and is in fact sufficient to establish the contention of the plaintiffs that the Shanars are by custom prohibited from entering the plaint temple."



The judgment then proceeded: "A great deal of evidence has been adduced with regard to the rights of the Shanars to enter Hindu temples, other than the plaint temple, whether in other parts of the Madura district or in other districts of the Presidency. There is some evidence on defendants' side that Nadars have been allowed to enter certain Hindu temples in the Tanjore and Coimbatore districts, and at Chidambaram in the South Arcot district, and also at Palani in the Madura district, but there is an overwhelming preponderance of evidence on the plaintiffs' side against the existence of any such right in the temples generally in the Madura district. . . . So far as an inference with regard to the custom in the plaint temple can be drawn from the practice in other Sivaite temples of the Madura district, the evidence on this point is strongly in favour of the plaintiffs' contention. The evidence adduced is too meagre to establish any custom in regard to the practice of temples at a distance from Madura, and in any case the inference to be drawn from such practice, if established, grows weaker in proportion to the distance from the plaint temple.

"A great mass of evidence on both sides was adduced with reference to the issue as to whether the defendants belong to a class inferior to the other classes that worship there; but, as already remarked, this question is relevant only in so far as it leads to an inference with regard to the alleged prohibition against the Shanars entering the plaint temple. The evidence is, as might be expected, conflicting, but there can be no doubt whatever as to its general result. There is no sort of proof, nothing, we may say, that even suggests a probability, that the Shanars are, as the defendants contend, descendants from the Ashatriya or Warrior caste of Hindus, or from the Pandiya, Chola, or Chera race of kings, and the futile attempt of the Shanars to establish the connection has brought well-deserved ridicule on their pretensions. Nor is there any distinction to be drawn between the Nadars and the Shanars. Shanar is the general name of the caste, just as 'Vellala' and 'Maravar' designate castes. 'Nadar' is a mere title, more or less honorific, assumed by certain members or families of the caste, just as Brahmins are called Aiyars, Aiyangars, and Rows. All 'Nadars' are Shanars by caste, unless, indeed, they have abandoned caste, as many of them have by becoming Christians. The Shanars, as a class, have from time immemorial been devoted to the cultivation of the Palmyra palm and to the collection of its juice and the manufacture of liquor from it. Their own local traditions connect them with the toddy drawers of Ceylon, whence the Tiyans,



or toddy drawers of the west coast, are also supposed to have immigrated. There are no grounds whatever for regarding them as of Aryan origin. Their worship was a form of demonology, and their position in general social estimation appears to have been just above that of Pallas, Pariahs, and Chucklies (who are on all hands regarded as unclean and prohibited from the use of the Hindu temples), and below that of Vellalas, Maravars, and other cultivating castes usually classed as Sudras, and admittedly free to worship in the Hindu temples. In process of time many of the Shanars took to cultivation, trade, and money-lending, and today there is a numerous and prosperous body of Shanars who have no immediate concern with the immemorial calling of their caste. In many villages they own much of the land and monopolize the bulk of the trade and wealth. With the increase of wealth they have, not unnaturally, sought for social recognition and to be treated on a footing of equality in religious matters.

"In a few individual cases in Tanjore and other districts away from Madura they appear to have, to some extent, succeeded, but the general attempt of the caste to force itself to an equality with the better castes in social and religious matters has been fiercely resisted in the southern districts, and especially in Madura, where serious rioting and loss of life have resulted. The general result of the oral evidence as to the position of the Shanars in the social scale, as above stated, is abundantly borne out by all the best authorities who have written on the subject. Extracts from these are given in paragraph 59 of the Subordinate Judge's judgment. The reference to the Abbé Dubois' work is inaccurate, but the other extracts are to much the same effect. We refer to a few of them. In the official report on the census of 1871 (exhibit L) it is stated: 'The Shanar people, in whatever district they may be found, are clearly a non-Aryan people. The relations of the sexes and their religious development are just those of all aboriginal people. In Tinnevely and Canara they are chiefly devil-worshippers. In Malabar they have hardly any religion at all, beyond the worship of some local deities. They are chiefly classed as Sivaïtes 68.3 per cent., but 24.4 per cent are nominally Vishnuvites. They have their own gurus or priests in the Sivaïte sects, but Brahmins officiate for the Vishnuvites'; and again, 'it has been ascertained that many of the Shanars of Tinnevely returned themselves as Kshatriyas, a position in the caste system which they have no claim to.'

.....

[Extracts from other works are omitted.]



"Again Dr. Caldwell in his 'Dravidian Grammar,' page 77, says: 'In Northern India, the Sudra is a low caste man; in Southern India he ranks next to the Brahmin, and the place which he occupies in the social scale is immeasurably superior, not only to that of the Pariahs and agricultural slaves, but also to that of the unenslaved low castes, such as the fishermen and the cultivators of the cocoanut and the palmyra palms.'

"These and the other extracts from various writers which have been filed as evidence in the case give no support to the pretensions of the Shanars. On the contrary, they go a considerable way to suggest that the Shanars are not likely to have a right by immemorial custom to worship in Sivaite temples, but are rather likely, from their low original occupation and social estimation, and the demonological character of their worship, to be excluded from such temples. The Shanars admittedly have a temple of their own in Kamudi dedicated to Subrahmanya Badrakali, and there are many other such temples elsewhere.

"Another matter from which an inference as to the custom of the temple may well be drawn is that referred to in the fifth issue, which runs as follows: 'Whether there are shastras prohibiting the defendants from entering and worshipping in the plaint temple.'

"The Subordinate Judge has examined this question at length, and his conclusion is that, according to the Agama shastras, which are received as authoritative by worshippers of Siva in the Madura district, entry into a temple where the ritual prescribed by these shastras is observed is prohibited to all those whose profession is the manufacture of intoxicating liquor and the climbing of palmyra and cocoanut trees. No argument was addressed to us to shew that this finding is incorrect, and we see no reason to think that it is so. It might, of course, be that the local custom differed from the rule laid down by the shastras, but, in the absence of evidence, the inference to which the shastras would lead is that Shanars are prohibited, owing to their hereditary caste occupation, from entering the Sivaite temples, and we have already seen that this is also the conclusion to be drawn from all the other evidence in the case. No doubt many of the Shanars have abandoned that occupation and have won for themselves, by education, industry, and frugality, respectable positions as traders and merchants and even as vakils and clerks, and it is natural to feel sympathy for their efforts to obtain social recognition and to rise to what is regarded as a higher form of religious worship; but such sympathy will not be increased by unreasonable and unfounded pretensions, and in the effort to rise the Shanars must not invade the established rights of



other castes. They have temples of their own, and are numerous enough and strong enough in wealth and education to rise along their own lines and without appropriating the institutions or infringing the rights of others, and in so doing they will have the sympathy of all right-minded men, and, if necessary, the protection of the Courts.

"The only other question is as to the remedy to which the plaintiffs are entitled in the present case. There can be no doubt but that the defendants did enter the temple notwithstanding the protests of the temple authorities on May 14, 1897, and that, as purificatory ceremonies were thereby rendered necessary, the plaintiffs are entitled to damages. . . ."

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The reasons for the report were delivered by

Lord Robertson. The question between the parties is whether the appellants and the caste to which they belong have legal right to enter and worship in a temple at Kamudi. This temple is dedicated to the worship of Shiva, and the customary ceremonies of Hindu worship are there carried on. It is common ground between the disputants that the appellants represent a caste called the Nadar or Shanar caste. It is alleged by the respondents that the presence of persons belonging to the appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste Hindus who worship in this temple, and that it is contrary to custom in this temple. Both Courts in India have decided against the appellants, the judgment of the Subordinate Judge discussing the question in great detail and with much research, and the High Court at Madras resting their decision upon extremely comprehensible and cogent grounds.

The controversy touches, but does not involve, delicate and abstruse questions of Hindu religious doctrine. In the view of their Lordships it admits of decision upon a much more palpable and limited range of facts.

First of all, the appellants, as matter of fact, worship by themselves in a temple of their own. Second, the result of the evidence is a complete failure to prove any resort by persons of the appellants' caste to the temple in dispute. Those two facts not merely negative the case of the appellants that they "have been from time immemorial participating in the pooja and worship" in the disputed temple, but they make easy the respondents' further contention that this separation in worship between the two classes was not accidental or voluntary, but rested on a deeper ground.



The evidence has been admirably analysed by the High Court, and their appreciation of the quality of the evidence on the one side and on the other, concurring as it does with that of the Subordinate Judge, is entitled to the greatest weight.

The argument addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the respondents as involving the exclusion of Nadars, and it was endeavoured to shew that there were inconsistencies in the respondents' treatment of the appellants in other respects.' All this, however, as matter of theological argument, is too rationalistic; while, on the other hand, it wanders from the region of fact and custom. What the respondents have succeeded in proving is that by custom the appellants are not among the people for whose worship this particular temple exists.

Their Lordships have spoken of "the respondents" generally; but it is necessary to note the episode in the proceedings euphemistically described as "the compromise." The original plaintiff in the suit was the rajah, who was the hereditary trustee of this temple, which was the temple of one of the villages in his zemindari. After the case had been decided in his favour by the Subordinate Judge, this person thought fit to profess that he now saw that he and the judge were wrong; and he asked that the judgment should be altered, so as to defeat his own action. A very sordid motive for this surrender was specifically asserted and has not been disproved. The Court, on being applied to, very properly reinforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by this time convalesced). The principles applicable to the case of a trustee who thus betrays his trust by surrendering a decree have been well stated and applied by the High Court.

For these reasons their Lordships, on June 16 last, agreed humbly to advise His Majesty that the appeal ought to be dismissed, and ordered the appellants to pay the costs of the appeal.

NOTE: What is the "deeper ground" for separation to which the court refers?

To what extent does the holding on this case depend on the fact that all of the parties are thought of as being within the overarching sacral order of Hinduism with its graded inequality of religious rights? Is the decision here one that depends on Hindu doctrine? On local custom? On some rule more general than either? Would it apply at all to non-Hindus--to Muslims, Christians, Parsis? Suppose the groups are high-caste and low-caste Christians and former sue for restoration of the wall that separated them in Church? See Michael Pillai v. Barthe, A.I.R. 1957 Mad. 431. Suppose Sunni Muslims would like to exclude Shias, or vice versa? See e.g., Mrs. Jangu v. Ahmadullah, 13 All. 419 (1891); Jiwan Lal v. Habib, AIR 1933 Lah. 759.



Is such a right of exclusion something that depends on the special character of temples? Would it apply to a well or tank? To a street or road?

What view does the court take of custom? Is it assumed to be unchanging? Who can change temple practice? The Trustees? A majority of the worshippers? The unanimous worshippers? No one?

In administering Hindu law, the court deemed all Hindus who were not members of the twice-born varnas as Sudras? Is the Court here saying that there are Hindus who are lower than Sudras? Who are not within the four-varna system? Are the Shanar's "untouchables." The term was not yet in use. Would it have helped the Court to have such a term? See, Atmaram v. King Emperor, below.

Does such a rule necessarily work to the advantage of those who wish to exclude others? Suppose the community that aspires to enter can show that the Agamas permit it to enter? See Gopala v. Subramania, A.I.R. 1915 Mad. 363. Suppose it can show that other groups which are equally polluting are allowed to enter. See Kutti Chami Moothan v. Rama Pattar, A.I.R. 1919 Mad. 755.

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II - 15

APPAYA AND ANOTHER, (Original Defendants, Appellants, v.
PADAPPA, (Original Plaintiff), Respondent^{*}

BOMBAY HIGH COURT
I.L.R. 23 Bombay 122 (1898)

APPELLATE CIVIL

Before Mr. Justice Parsons and Mr. Justice Ranade

Jurisdiction--Jurisdiction of Civil Courts--Caste question--Excommunication--
Court's power to inquire into the validity of the order of excommunica-
tion--Burden of proof.

Second appeal from the decision of F. C. O. Beaman, District Judge of
Belgaum.

The plaintiff and defendants were bhāubands belonging to two different
branches of a family of pujāris, or officiating priests, of a Jain temple
at Gavan in the Belgaum District.

There were certain lands set apart for the remuneration of the pujāris,
which were in the possession and enjoyment of the defendants.

The plaintiff alleged that the Jain Swāmi, who managed the affairs of
the temple, had excommunicated the defendants for misconduct, and had appointed
the plaintiff as the pujāri of the temple. The plaintiff, therefore, brought
this suit, praying for an injunction restraining the defendants from entering
the temple and from touching and worshipping the idol, on the ground of their
excommunication.

Defendants pleaded (inter alia) that they had been excommunicated without
sufficient reason, and that the inquiry into their conduct was held by the Swāmi
ex parte and without any notice being given to them. They also pleaded that
the suit was not cognizable by the Civil Court, as it involved a caste
question.

The Subordinate Judge held that the Court had jurisdiction to entertain
the suit, that the sentence of excommunication was justifiable, and that
the defendants had in consequence forfeited their right to the office of
pujāri. He, therefore, granted the injunction sought, and ordered the
injunction to remain in force until the defendants were re-admitted to their
caste.

^{*} Second Appeal, No. 895 of 1897.

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This decision was confirmed, on appeal, by the District Judge, who was of opinion that the Civil Court had no power to inquire into the validity of the order of excommunication, though the evidence in the present case did not disclose any very definite ground for the excommunication.

The defendants preferred a second appeal to the High Court.

.....

Parsons, J.:--In this case the plaintiff, who is the pujari of a temple at Gavan, sued for an injunction to restrain the defendants from entering the temple and from touching and worshipping the idol, on the ground that they had been excommunicated by the Swami for misconduct. The defendants, admitting the power of the Swami to excommunicate for proper cause, disputed the fact and the legality of the excommunication.

The Judge of the lower appellate Court held that the Civil Court had jurisdiction to grant the injunction, but that it could not inquire into the validity of the order of excommunication. I do not agree with the latter proposition in this case where civil rights are at stake. The parties are Jains and the Swami is their religious chief; as such he may have the power to excommunicate offenders against the tenets of their religion, but when it is sought to extend a civil sanction to an ecclesiastical offence, by enforcing the order of excommunication and thereby depriving persons of civil rights which otherwise they would be entitled to exercise, it must always be open to the Civil Court, whose aid is invoked to enforce it, to inquire if the order was made by the Swami in the proper exercise of his power.

On this point there seems to be no conflict of authority. . . . [Citations omitted]

In the case we are now dealing with, the sentence of excommunication was passed, not by a caste, but by an individual, the Swami or religious chief of the sect to which the parties belong. Its legality is disputed by the defendants, who say that they were guilty of no offence for which a sentence of excommunication could properly be passed, and that the inquiry into their conduct was held by the Swami ex parte and without any notice being given to them. I think that a Civil Court has jurisdiction to inquire into that plea and that it lies on the plaintiffs, who seek to enforce the sentence and by virtue of it to deprive the defendants of their civil rights, to prove that it was passed on justifiable grounds and after a fair and proper enquiry.



We, therefore, frame an issue on that point, namely:--Was the sentence passed on justifiable grounds and after fair and proper inquiry? and ask the Judge of the lower appellate Court to find on it, taking evidence if necessary, and certify his finding to this Court within two months.

Ranade, J.:--In this case, the parties are Jains, and belong to different branches of the family of the pujāris of a temple. The original claim was for an injunction to prevent the appellants from entering the temple, and worshipping the idol, and the ground on which the injunction was sought was the alleged excommunication of the appellants by the Swāmi of the caste, who it appears had also some hand in the management of the temple, and had appointed the respondent-plaintiff to officiate as pujāri. The appellants denied the Swāmi's right over the temple, as also plaintiff's claim to be pujāri, and they further denied the alleged excommunication and misconduct. Finally, they urged that the claim was in the nature of a caste question, and, as such, excluded from the jurisdiction of Civil Courts.

The Court of first instance held that the Court had jurisdiction, that the plaintiff was of the pujāri family, that the appellant-defendants had been excommunicated, and for a justifiable cause, and that the injunction sought for should be granted until such time as the appellants were re-admitted to caste. The appellants in their grounds of appeal to the District Court raised the question of jurisdiction, as also of respondent's right to sue, and of the fact and validity of the excommunication. The District Judge, however, laid down only two issues, as to (1) whether the Civil Court had jurisdiction, and (2) whether the excommunication was justifiable. He found both these issues in the affirmative, and confirmed the decree. Though this finding on the second issue apparently suggests that the District Judge was satisfied that the excommunication was proper and justifiable, yet it is clear, from the express words used towards the conclusion of the judgment, that what the District Judge really found on this point was that the Civil Court had no power to inquire into the validity or justification of the Swāmi's excommunication. If the question was one which could be considered open for inquiry, the District Judge clearly stated his view that there were no definite grounds for the excommunication, and none which the Courts would regard as adequate. In other words, while, in so far as the respondent-plaintiff's claim for injunction was concerned, the District Judge was inclined to hold that it was a matter within the cognizance of Civil Courts, yet when the factum and justification of the



alleged excommunication on which the claim for injunction was based were denied, the District Judge was of opinion that the Courts could not inquire into such a defence. These two positions seem to be obviously inconsistent, and I feel satisfied that a careful consideration of the authorities does not lead to any such conflict.

If the position of the parties had been reversed, and the present appellants had brought the suit to establish their right to the office of pujāris, or to enter the temple and worship the idol, it is plain that they would have a perfectly clear right to require the Courts to entertain such a suit, and if the defence raised was of excommunication, to ask the Courts to inquire into the factum and binding character of that action. It has been decided in a large number of cases that a suit for restoration to caste and for obtaining a declaration that the expulsion was not justified, would lie in the Civil Courts . . . [Citations omitted]. In Gopal v. Gurain¹, the suit was brought by plaintiff to secure his restoration to caste from which he had been expelled by reason of a charge brought by defendant against him of adultery. In such a case it was held that the defendant may plead justification, and plaintiff may show that the charge was false. In Venkatachalapati v. Subbaravadu², it was ruled that the right to worship in a public temple is a civil right, and when it is questioned on the ground of excommunication, it is competent to the Courts to inquire into the defence and they are bound, when necessary, even to examine the religious foundations on which the excommunication is based. In such an inquiry it must be shown that the Swāmi had jurisdiction, and that there was an express declaration and that the excommunication was passed in accordance with usage, and after hearing the explanation of the person charged. This same view was expressed still more strongly in Jagannath Churn v. Akali Dassia.³ There also the plaintiff's right to enter a prayer house was resisted on the ground of an alleged expulsion by the majority of the Samaj. The Court followed the ruling in Gopal v. Gurain⁴ and dissented from the Bombay ruling in Pragji v. Govind.⁵ It was observed that even if this last ruling were accepted, it would be still necessary to see if the rule or order of the majority was properly arrived at in a bonā fide manner, and that it was in conformity with natural justice. In Ganapati Bhatta v. Bharati Swami,⁶ which was also a case of expulsion from caste, it was held that a guru has, no doubt, a right to exercise his jurisdiction according to caste usage, and when he exercises his jurisdiction

¹(1867) 7 Cal. W.R., 299.

²(1889) 13 Mad., 293.

³(1893) 21 Cal., 463.

⁴(1867) 7 Cal. W. R., 299.

⁵(1887) 11 Bom., 534.

⁶(1893) 17 Mad., 222.



with due care and in accordance with custom, Civil Courts will not interfere with his action--Murari v. Suba.¹ If these limits are exceeded, there is no protection--Queen v. Sankara.² Similarly it was held in Krishnasami v. Virasami,³ that even when the expulsion had been ordered under a bonâ fide, but mistaken, belief on a point of fact, and it was shown that plaintiff had not been guilty of the misconduct imputed to him, he has a right to have the order of expulsion set aside. Kernan, J., who decided the case, observed that 'a caste custom permitting expulsion without notice would be invalid. The caste institution is not above or outside the law. Usage and custom exist only under, and not against, the law.'

When a man had been expelled from his caste for alleged adultery, and the caste had allowed him no opportunity to defend himself, the order of expulsion was set aside--Vallabha v. Madusudan.⁴ The fact is that in such matters the Courts treat caste corporations like any other voluntary societies or clubs. If their proceedings are bonâ fide and fairly conducted, their action is upheld and not otherwise. The principle of the rulings in Advocate General v. David Haim Devakar,⁵ which was a dispute between Beni Israelite parties, and the case in Gompertz v. Goldingham,⁶ which related to a club, apply equally to expulsions from caste. If there is jurisdiction, and the procedure is fairly conducted and bonâ fide, the action of the caste, corporation or club is upheld. If possible, for the reasons stated by the Judges who decided the case of Jagannath Churn v. Akali Dassia, the Civil Courts have to be more careful in the matter of caste expulsions than is necessary in the case of voluntary associations. It might be indeed contended that section 21 of Regulation II of 1827 imposes a special limitation on the power of the Courts of this Presidency. This contention is, however, not correct. As laid down by West, J., in Anandav v. Shankar, and affirmed by the same Judge in Pragji v. Govind, and By Sargent. J., in Murari v. Suba, section 21 of Regulation II of 1827 only prevents such interference as is likely to affect the autonomy of caste tribunals. The section itself provides a remedy in the matter of alleged injury to caste or character in the shape of damages. This means that Courts have jurisdiction when the injury is due to illegal or unjustifiable conduct of the other party. Such suits must be clearly distinguished from caste disputes proper. Claims between rival factions of the same caste to common caste property, claims to leadership of

¹(1882) 6 Bom., 725.

²(1883) 6 Mad., 381.

³(1886) 10 Mad., 133.

⁴(1889) 12 Mad., 495

⁵(1886) 11 Bom., 185.

⁶(1886) 9 Mad., 319.



caste, claims to require voluntary offerings and honours and presents to be paid to particular members, claims to officiate as priests against the consent of the caste, claims for compulsory invitations to dinners, etc. . . . [Citations omitted] These are matters which affect the internal autonomy of the caste and its social relations, and suits in regard to them have been properly held to be barred by section 21 of Regulation II of 1827 and similar enactments in other parts of India.

But where, as in this case, a man's character and status as a member of a caste is called in question, and on the strength of an alleged excommunication it is sought to deprive him of the use of a priestly office connected with a temple, with lands and perquisites attached to it, it is clear that the Courts must inquire into the factum of excommunication, and to see that the expulsion was in accordance with caste usage and in conformity with natural justice. It may not be possible for a Court to determine the adequacy of the religious grounds on which the excommunication is based, but it can and ought to satisfy itself that there are fair and bona fide grounds for such action. There is nothing in the record to show that the excommunication in the present case fulfilled this character. It appears that the misconduct attributed to the appellants is that they did not attend upon the Swami, and that they refused to allow a share in the temple lands in their possession to the other sharers. The District Judge himself states that there are no adequate grounds for the alleged expulsion. It is also not clear whether the Swami has a right of dismissing or employing the pujari in the temple, or whether the excommunication has been resorted to in order to compel obedience to the wishes of the bhaubands for a share in the temple lands.

If the appellants as plaintiffs had a right to require the Courts to make an inquiry into the factum and regularity and bona fides of the excommunication proceedings, it is clear they have a stronger right as defendants to insist upon such inquiry before an injunction is given against them.

We must, therefore, remand the case for a finding upon the issue about the regularity and bona fides of the excommunication.

Case remanded.

N.B.—Upon remand the District Judge found that the sentence of excommunication was not passed on justifiable grounds after a fair and proper inquiry.

On this finding the High Court reversed the decree of the lower Court and dismissed the suit.



NOTE: Note the requirement of "justifiable grounds" for expulsion as well as a fair and proper inquiry. What might justifiable grounds be? What is a fair and proper inquiry? What effect might such judicial supervision have upon a caste? Does it favor orthodoxy over innovation? Established authorities over dissidents? Or does it undermine established authorities? Does it rigidify caste custom or loosen it?

In what respect are castes like "any other voluntary societies or clubs?" Is this an Indian notion or an English one? If a caste is a voluntary association, may a group of persons voluntarily form a caste? Compare Deivani Achi v. Chidambaram Chettiar, A.I.R. 1954 Mad. 657.

Are castes religious groups--i.e., characterized by distinctive religious tenets and practices? Cf. the earlier analogy to dissenting churches.

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II - 22

GOVIND DAS, Plaintiff-Appellant, v.
BISHAMBHAR DAS, Defendant-Respondent.

A.I.R. 1917 Privy Council
(From Allahabad)

23rd May 1917.

Viscount Haldane, Lord Atkinson, Sir John Edge and Mr. Ameer Ali.

Privy Council Appeal No. 11 of 1916.

Mr. Ameer Ali:--This appeal arises out of an action for libel brought by the plaintiff in the Court of the Subordinate Judge of Benares, where the parties reside and carry on business. Both belong to the Agarwala Vaishya caste of Hindu, and both appear to occupy an influential position in their community.

The Agarwalas of Benares are divided into two Tars or sections, one called the Purbia or Eastern, the other Pachhain or Western; but in doctrinal matters and caste observances there seems to be no difference between them. The inter-communal government of each section is vested in a panchayat composed of the general body of its members, which, so far as appears on the record, has authority to enforce the due observance of the caste rules. In this connection it should be mentioned that there are numbers of Agarwalas in the neighbouring towns of Mirzapur and Chunar with whom the Benares Agarwalas maintain close social relations.

The proceedings in this case show that many of the Agarwalas of Benares take a much stricter view of the doctrines of their religion than most of their fellow castemen, especially in Western India; and in no respect is the difference more pronounced than on the question of a sea voyage undertaken by a Hindu. Whilst other Hindus, including Agarwalas, hold that a purification ceremony technically called prayaschitta absolves the sin incurred by a voyage across the seas, the Benares Agarwala holds firmly to the doctrine that the taint the offender contracts is beyond absolution. In recent years, however, a strong body of public opinion has been growing up which considers this extreme view to be not only illiberal and opposed to the spirit of the times, but also as unwarranted by the Shastras. The plaintiff seems to be the protagonist of this school of thought. The controversy between what may be called, for the purposes of this judgment, the orthodox section, and the comparatively smaller body of reformers assumed an acute character with the return to India in May, 1910, of

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one Babu Lakshmi Chand, also an Agarwala belonging to the Western section. He appears to have been sent to England as a Government scholar, and to have had in this country a meritorious career. On his arrival, however, at home he was promptly put out of the caste by the panchayat of his section. His academical distinctions in England were appreciated by the advanced and liberal-minded people of his community, who received him with marks of esteem and respect; and after he had gone through the prayaschitta ceremony they gave a dinner in his honour, at which several of the younger members of the plaintiff's family are said to have been present. This seems to have offended the religious feelings of the orthodox; a chittha, or "declaration of faith," was drawn up, it is said, at the instance of the defendant (whose position in the panchayat will be explained later on) and circulated for signature among the members of the caste. It is alleged by the defence, but denied by the plaintiff, that this document was presented to him, and that he declined to attach his name to it. On his side, he issued to his caste-people and others a public appeal, in which he pleaded for toleration and a more liberal interpretation of the religious doctrines of the sect. In this leaflet he also gave expression to certain strictures on other members of the caste, apparently to show the inconsistency of their attitude towards moral delinquency. This was regarded by a majority of the caste-people as implying a reflection on them and they decided on holding a meeting on the panchayat to consider the matter in relation to plaintiff and his brother Bhagwan Das. The meeting was accordingly held on the 19th of June, 1910; whether it was convened in accordance with the rules of the panchayat and whether plaintiff had notice of the meeting will be discussed shortly. The sitting of the panchayat is said to have lasted from eight in the evening until next morning, so the debate must have been prolonged, and it may fairly be presumed that persons interested in the proceedings had ample opportunity to put in an appearance. Finally, as the plaintiff was in Calcutta and could not attend, and his brother Bhagwan Das did not or would not do so, the panchayat passed a resolution, the publication of which forms the libel charged against the defendant in this action.

The resolution is in these terms:--

"It was settled by the panches that since B. Gobind Das and B. Bhagwan Das publicly circulated among the biradris, and the non-biradris a pamphlet about the biradri against the practices of the biradri and did not attend the panchayat on being called to do so,



these facts show that these gentlemen circulated the pamphlet simply to disgrace the biradri and their not signing the chittha shows that their views are against the panchayat; therefore, it is ordered that until B. Gobind Dass and B. Bhagwan Das clear themselves, the family of B. Madho Das be barlao band."

In the plaint the order recorded by the defendant is given more briefly. Whether the whole resolution or only the substance, as given in the plaint, was communicated, the kernel of the publication was the decision to suspend social relations with the plaintiff. The communication was made by the defendant Bishambhar Das in his capacity of chaudhri, or chairman, of the Purbia panchayat to the Western section, who were, it is not disputed, interested in the result of the proceedings, and to other members of the caste in Benares, Mirzapur and Chunar. The plaintiff on his return from Calcutta sent a registered letter to the defendant asking for particulars regarding the resolution and the facts on which it purported to be based. This letter was submitted to a smaller gathering of the community called a baithak, which apparently deals with minor matters affecting the caste; and it was decided to give no reply.

On the 24th of August, 1910, the plaintiff brought the present suit. The main allegations on which the action is based are that the meeting of the panchayat at which the resolution was adopted was not held in "good faith;" that it was composed of defendant's friends, "who were under his influence," and in effect it was a sham meeting; that no opportunity was given to him to get up a defence;" and that in sending the resolution to the chaudhri of the Pachhain section and the caste-people generally the defendant was actuated by malice and ill-will. The plaintiff further alleged that by this act of the defendant, which virtually declares him to be an "out-caste," he has been disgraced and humiliated in the eyes of the members of the caste as well as the public at large and prejudicially affected in his religious and communal rights and that he has also suffered mentally; and he claimed 11,000 rupees as damages for the injury caused to him.

The defendant joined issue on all the material allegations; he alleged that the meeting was regularly held, that the proceedings were bona fide, that due notice in accordance with the rules of the panchayat was given to the plaintiff and the other members of his family; he further pleaded privilege, alleging that in sending a copy of the resolution to the Pachhain panchayat and others he acted in discharge of his duty; and he denied that his action was the outcome of malice or ill-will.



The Subordinate Judge held that a meeting of the panchayat was in fact held on the 19th of June, 1910, and that the defendant was "as much liable for the resolution passed at that meeting as any other member" of the panchayat. He held further that the conduct of the defendant (in publishing the resolution) was not privileged, inasmuch as no notice of the meeting was given to the plaintiff, nor was he told with what offence he was charged. The defendant, therefore, has done an act which constitutes malicious defamation of the plaintiff." In another part of his judgment he says as follows:--

"It was the duty of the chaudhri to publish the resolution complained of, and there is no malice in such publication. The legal malice consisted in not giving opportunity to the plaintiff to defend himself, and in passing that order behind his back. The publication of the order cannot be called malicious."

Their Lordships have referred to these findings of the trial Judge, as they form the sheet-anchor of the plaintiff's case on this appeal.

Proceeding on these grounds, and after an elaborate exposition of the Hindu doctrines relating to the lawfulness of sea voyages, he made a decree in favour of the plaintiff, awarding him a small sum as damages, as he considered he had merely a sentimental cause of action.

The defendant appealed to the High Court of Allahabad, which reversed the decree of the Subordinate Judge and dismissed the action, holding that the communication made by the defendant was privileged, and that there was no evidence of express malice.

On the present appeal, which is by the plaintiff to His Majesty in Council, the arguments have travelled over a rather wide area. In their Lordships' opinion, however, upon the facts proved or admitted in the case, the only points for determination are those on which the High Court proceeded, namely whether the occasion on which, the communication was made by the defendant to the chaudhri of the Pachain section and members of the caste interested in the matter was privileged; and if it was, whether he has forfeited it by reason of the fact that in making the communication he was actuated by what is called in law express malice. The onus of establishing this fact that his conduct was the outcome of some improper motive or private spite rests on the plaintiff.

The principles relating to both these questions are well settled and require no examination. Their Lordships need only refer to Toogood v. Spyring [citations omitted] in which Baron Parke enunciated the rule as to privilege



which has been accepted in subsequent cases as furnishing the guiding principle on the subject; and to the case of the London Association for the Protection of Trade v. Greenlands and the recent case of Adam v. Ward in the House of Lords, not yet reported.

The allegation of the plaintiff that the meeting at which the resolution was passed was not a bona fide meeting of the panchayat has been clearly disproved; the High Court has expressly found that the panchayat was regularly convened, and that the proceedings were in conformity with its rules, and there is nothing in the Subordinate Judge's judgment to suggest or support a contrary view. The defendant, it is proved, is one of the two chaudhris of the panchayat. Their Lordships gather that he is the principal Choudhri; anyhow, it is his duty to give effect to the decisions of the panchayat, and to communicate the result of its proceedings to parties interested in the same. Along with the general body of the caste, the Pachain section was interested in the decision of the Purbia panchayat as it might seriously affect their own attitude with regard to the controversy. The resolution suspends provisionally social relations of the caste people with the plaintiff and his family. The defendant denies that this amounts to "outcasting" the plaintiff; but assuming that it conveys the innuendo he charges, their Lordships are clearly of opinion that the defendant acted in discharge of the duty imposed on him in making the communication to the chaudhri of the other section, and to the caste-people generally, and that the occasion was privileged.

The plaintiff's case, both in his plaint and on the evidence, was that the action of the defendant was the outcome of private spite. Again, the High Court has found that the defendant acted in good faith in the execution of his duty, and that it was not shown that he was "actuated by ill-will or ulterior or improper motive," nor does the Subordinate Judge hold the contrary. The trial Judge inferred what he calls "legal malice" from the failure of the defendant to give a sufficient personal notice to the plaintiff. Their Lordships do not understand what the learned Judge means by legal malice. To defeat or rebut privilege, the law does not recognize anything short of actual or express malice in the publication of the matter which is charged to be libellous. They find no ground for supposing there was any duty imposed on the defendant beyond properly and duly giving effect to the rules of the panchayat; the inference of "legal" malice from his not doing something more seems to their Lordships quite unwarranted.



But it has been contended that the absence of proper notice to enable the plaintiff to attend the meeting and exculpate himself, being contrary to the principles of natural justice, vitiates the whole proceeding and affects the bona fides of the defendant's action. This contention seems to confuse two distinct considerations. Whatever may be the effect of the absence of such a notice with regard to the adjudication of the matter, unless it can be shown that the defendant was bound to examine into the regularity and correctness of the panchayat's decision before issuing a copy of the resolution to parties interested in the question, it would be absurd to say that the privilege is affected or rebutted by want of notice.

It is clear, however, that a notice in accordance with the rules and practice of the panchayat was given in fact to the plaintiff's family, and at the family residence standing in the panchayat register. He no doubt was absent in Calcutta, but the question that was to be debated affected all the members of the family, and any one of them could have attended, if not to answer the charge, at least to ask for an adjournment.

The finding of the Subordinate Judge on this point is distinct. He says:--

"The defendant gave notice to the plaintiff in the usual manner, namely, by sending the barber to the Kothi house in the city. It is not denied that the barber gave notice of the meeting to the plaintiff's Gumashtha, Debi Prasad. For all ordinary panchayat purposes such notice would have been enough. No notice ever was given by the plaintiff to the defendant that the four brothers are separated and that in the panchayat register, instead of one name, four names should be entered, and that in future all notices should be sent to the different residential houses of the plaintiff and his brothers and not to their joint house in the city."

Their Lordships are of opinion that this appeal fails; they will accordingly humbly advise His Majesty that it should be dismissed with costs.

Appeal dismissed.

NOTE: To what extent does the Privy Council require any "justifiable grounds" for expulsion? Compare with the Appaya case. Does it make a difference that in Govind Das it is the excommunicated party who is seeking relief rather than the caste that is seeking enforcement of its decree?

To what extent does the ruling here depend upon the Hindu character of the group? Would it also apply to a Muslim community? See e.g. Yusuf Beg Sahib v. Malip Syed Sahib, A.I.R. 1927 Mad. 397.

* * * * *



ATMARAM, Accused--Applicant v.
KING EMPEROR, Non-Applicant

COURT OF THE JUDICIAL COMMISSIONER FOR THE CENTRAL PROVINCES
A. I. R. 1924 Nagpur 121 (1)
A. J. C. Prideaux

Cr. Rev. Nos. 132 to 140 of 1923, Decided on 20th July 1923, from
an order of the Sub-Divisional Magistrate, Chanda, D/- 10th March,
1923.

Order.--This order disposes of Criminal Revision Nos, 132 to 140 of 1923, the applicants being Atmaram, Poona, Ragho Dewoo, Somia, Kuksia, Sakhia, Lahania and Jairam. The facts found are freely admitted in this Court. It seems that for some time there had been considerable friction between the Kunbis and Mahars of Washber, Tahsil Garhchiroli, District Chanda. The Mahars have ceased to deal with the carcasses of dead animals and are seeking, in various ways, to raise themselves in the social scale. There is at that village an idol named Meghnath and the idol seems to have a temple and an enclosure to that temple. It is admitted that from time immemorial this idol has been worshipped by Kunbis and other castes. Mahars have not been allowed to touch the idol or to worship inside the enclosure and their worship within the temple precincts had always to be carried out by some person of a caste enabling him to directly worship the diety.

On 17th September 1922, thirteen Mahars including the nine applicants entered that enclosure, slaughtered a goat there, sprinkled its blood upon the idol, put shendur on the image and adorned it with flowers. For this they have been convicted under S. 295, Indian Penal Code, and sentenced to a fine of Rs. 25 each and the sentences have been upheld on appeal.

No less than eight of the accused in the case admitted in their examinations that they knew that the touch of a Mahar would defile the deity. The section states:--

"Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damages or defilement as an insult to their religion, shall be punished. . ."



Now, there is no reasonable doubt that by long established custom Mahars have not been allowed to worship directly at the shrine and they must have known that to kill a goat there, to sprinkle its blood upon the idol or to touch the idol would in the opinion of a large number of Kunbis and other castes, constitute defilement of the idol. In argument here the broad ground that Mahars as Sudras have a right co-extensive with that possessed by all classes of Hindus to worship and touch all Hindu Gods is argued. This view in my opinion is far too broadly stated. When custom that has held for many centuries ordains that an untouchable, whose very touch is in the opinion of devout Hindus pollution, should not enter the enclosure surrounding the shrine of any Hindu God and when an untouchable with that knowledge deliberately enters and defiles it he has, in my opinion, committed an offence within the purview of S. 295, Indian Penal Code.

I have no hesitation in finding that the nine applicants in the present case have been rightly convicted and the fines imposed are not excessive. I dismiss all nine applications.

Application dismissed.

NOTE: Why did the court not look into the Agama sastras regulating the rights of the varnas in temples? What is the effect of such a decision on social mobility?

Does this decision imply a general protection from defilement? From breach of custom? Compare the following:

1. Vedagalais seek to enjoin Tengalais from taking idols in procession through village streets. The Court refuses to enjoin this since there can be no custom that one sect has an exclusive right to take processions through public streets. Sadagopachariar v. A. Rama Rao, I.L.R. 26 Mad. 372 (1902). But cf. Shanmurga Pandaram v. Ponnuswami, A.I.R. 1938 Mad. 714.

2. Some Doms who had recently joined the Arya Samaj were convicted for carrying a bride and bridegroom through the inhabited area of a village contrary to local custom, having been ordered by the police to dismount. Hold that the custom did not have the force of law and the acts complained of were part of the liberty of ordinary citizens. Jasani v. Emperor, A.I.R. 1936 All. 534.

Compare the cases on wells and tanks in the note following Govinda Amrita, below.



1965 -Galanter-Legal Material -Devchand Totaram Case (886)

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SHEO SHANKAR AND OTHERS, Applicants v.
KING-EMPEROR THROUGH GAJODHAR, Complainant-Opposite-Party

HIGH COURT FOR OUDH
I.L.R. 15 Lucknow 696 (1940)

Before Mr. Justice G. H. Thomas, Chief Judge, and Mr. Justice
R. L. Yorke

Thomas, C. J., and Yorke, J.:--This is an application in revision against the order of the Sessions Judge of Unao dismissing the appeal of the applicants who had been convicted by a Special Magistrate of Unao of offences under sections 295-A and 323 of the Indian Penal Code and sentenced each to pay a fine of Rs. 20 under the former section and Rs. 5 under the latter; with six weeks' rigorous imprisonment in default of payment of the fines. The learned Magistrate had also acquitted nine other persons charged with the same offences.

The prosecution story was quite simple. The complainant Gajodhar is an Ahir, but presumably in pursuance of the ambition frequently seen in these modern times to obtain a social and religious ranking higher than that which has been traditional for his caste, he has taken to the wearing of a sacred thread or janeo, and it is said that he got himself invested with this thread in a religious ceremony conducted by one Brahman and several Ahirs. The members of the opposite-party and specifically the applicants are Brahmans of village Kharauli, the same village of which Gajodhar is a resident. These persons take exception to the wearing of a janeo by the complainant because they regard him as a Sudra and not entitled to wear it. It is said that on the 3rd August, 1938, cattle worship was being performed in Kharauli and the complainant came near the place where it was being performed. For the defence it was said that exception was taken to Gajodhar participating in this as he had not paid any subscription, and he was told to go away. The prosecution case on the other hand was that the accused took this opportunity of attacking the complainant and, as it were, taking him down a peg. They pursued him, beat him with kicks and fists, and broke the janeo which he was wearing. The complainant alleged that the applicants broke his janeo with intent to wound his religious susceptibilities because he was an Ahir and so the accused had taken exception to his wearing janeo. The learned Special Magistrate who tried

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the case accepted the contention of the complainant that the act of the accused persons injured the religious susceptibilities of the complainant and convicted the applicants. . .

[The Special Magistrate had convicted them under Section 295-A of the Indian Penal Code, which provides that "[w]hoever, with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written or by visible representations insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment etc." However, the Sessions Judge thought the case covered by Section 295 (reprinted in text below) rather than Section 295-A. The High Court agrees, since "no stress has been laid on the words used by the accused in this case," and proceeds to consider Section 295.]

.....
The question . . . before us . . . is whether in the present case section 295 is properly applicable. By that section "whoever destroys, damages or defiles . . . any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment etc."

A point which has not been discussed before us is whether even if the religious susceptibilities of the complainant himself were actually injured by the act of the accused, their act could fall within the scope of section 295 unless it could be further held that it was an act committed with the intention of insulting the religion of a class of persons or with the knowledge that a class of persons would be likely to consider it an insult to their religion. We have grave doubts whether section 295 is really applicable at all to the present case in which not even an attempt has been made to show that the act could be an insult to the religion of a class of persons or had been done with the knowledge that a class as distinct from a particular individual would be likely to consider it an insult to their religion.

On the question whether the act of the applicants could amount to an insult to the religion of the complainant Gajodhar we have listened first to some considerable amount of argument on the question whether Ahirs are or are not Sudras. The preponderance of opinion is strongly in favour of the view that they are Sudras and do not belong to the twice-born classes. . . .

.....
[References to Sherring's Hindu Tribes and Castes, Bhattacharjee's Hindu Castes and Sects and Steele, Laws and Customs of Hindu Castes omitted.]



. . . It is, we think, quite evident that in popular estimation Ahirs are not in this part of the world regarded as anything higher than Sudras. On the other hand it is very commonly observable in these times, particularly whenever a census is in progress or is about to be undertaken, that many castes not commonly regarded as belonging to the twice-born classes make efforts to claim that they are members of those classes and to get themselves recorded under some particular head or sub-caste of one of the twice-born classes. We are clear in our minds that the complainant Gajodhar has adopted the wearing of the janeo in pursuance of this very commonly held ambition, and that he is not in the ordinary estimation of the Hindu world a person entitled to the wearing of the janeo and for whom the wearing of the janeo is part of his ceremonial observances under the Hindu religion. Two cases have been quoted to us in this connection. In Dalip and others v. Ganpat (1), the judgment begins as follows:

"This appeal raises a question as to the rights of inheritance of illegitimate sons of Sudras, the parties in this case being Ahirs," that is to say it was conceded in this case that Ahirs were Sudras.

In a case of the Nagpur Judicial Commissioner's Court, Domarsingh and another v. Hirondibai and another (2) it was held that "Ahirs, whether of the Nandvansi or any other sub-caste, are Sudras."

It appears to us clear that if Ahirs are Sudras and therefore not entitled to wear the sacred thread, it cannot be said that wearing the sacred thread is a part of their religion and therefore the damaging or destroying of a thread, worn by them in assertion of a mere claim to higher rank, could not be an insult to their religion, nor could an Ahir be supposed likely to regard such an act as an insult to his religion. But even supposing for the sake of argument that Ahirs are entitled to wear the sacred thread we do not think that the applicants by breaking the sacred thread or thread regarded as sacred by the complainant brought themselves within the scope of section 295 of the Indian Penal Code. In our opinion it is clear that the accused could not by any means be supposed to have had the intention of insulting the religion of the complainant. Although of different castes the parties are all persons holding the same religion. The act of the applicants was intended rather to teach the complainant not to be presumptuous and pretend himself to be something that he was not. The question then is whether it could be said that they had

(1) (1886) I.L.R., 8 All., 387.

(2) (1919) 54 I.C., 294.



the knowledge that the complainant would be likely to consider the destruction, damage or defilement by them of the thread which he was wearing as an insult to his religion. We think it conceivable that if a Muhammadan or a Christian or an atheist tore off the sacred thread which was being worn by a Hindu entitled to or even claiming to be entitled to wear it, and the assailant at the same time indicated disrespect for the thread, such a person might be conceived to know that the person whose thread was so treated would be likely to consider it an insult to his religion. We find great difficulty in supposing that in the circumstances of the present case where persons observing the same religion broke the thread of someone whom they regarded as an upstart wearing something which he was not entitled to wear, either the victim of assault would be likely to consider that act an insult to his religion or the assailants could be considered to have the knowledge that he was likely so to do. The truth of the matter is that it was not the religious susceptibilities of the complainant Gajodhar which were injured but his dignity, and therefore, we do not think that a conviction under section 295 of the Indian Penal Code is sustainable.

We accordingly set aside the conviction and sentences of fine passed under section 295 (or 295-A) of the Indian Penal Code and direct that the amount of fines, if paid, be refunded.

As regards the conviction and sentence under section 323 of the Indian Penal Code we have not been shown any reason to suppose that this conviction is not justified. Even if the case was not one of hurt, it clearly came within the scope of section 352 of the Indian Penal Code and the sentences inflicted were suitable for the conviction under either section. So far as the conviction under section 323 is concerned this application fails and is dismissed.

Application dismissed.

NOTE: Compare the significance of varna here with pre-1860 cases. Are they about very different sorts of things? Have the Courts become more varna-conscious over the years? If so, what might account for this?

Remember the remarks of the Privy Council in the Sankaralinga case about the aspirations of lower castes being all right as long as they didn't interfere with the rights of higher castes? Does wearing the sacred thread come under that heading? Would the Brahmins here have been entitled to legal redress to prevent Ahirs from wearing the thread? If the law won't act for either side, how is such a question to be settled? By force?

* * * * *



DEVCHAND TOTARAM KIRANGE AND ANOTHER, Plaintiffs--Appellants v.
GHANASHYAM SAKHARAM CHAUDHARI AND OTHERS, Defendants--Respondents

BOMBAY HIGH COURT
A.I.R. 1935 Bombay 361

Murphy and Barlee, JJ.

First Appeal No. 289 of 1928, Decided on 15th January, 1935, from
decision of First Class Sub-Judge, Jalgaon, in Special Regular
Civil Suit No. 497 of 1924.

Murphy, J.--These two first appeals have very similar subject-matters and have been heard together as the two suits were tried together in the Court below. They turn on the constitution of the leva patidar caste and its government. The leva patidars were migrants from Gujerat to the north-east of the Khandesh District in the Yaval taluka and some of the caste have gone beyond and into adjacent villages in the Nizam's Dominions and Berar. The headquarters of the caste are at Padalsa and there the Kutumb-nayaks, or representatives of the leading families, reside. These by turn are leaders of the caste, and summon the caste panchayat and also issue its decisions. A panchayat is convened by sending a summons in the form of a notice, in a book kept for the purpose, by messengers from village to village, till all those in which leva patidars are living have been served. The messenger takes the book to the leading man of each village and he, and sometimes other leading men as well, sign it in token of acknowledgment, and, it is then these persons' duty to communicate the notice of the meeting to their fellow villagers.

The point we are concerned with is in reality a caste question. The bulk of the leva patidar caste are ordinary Hindus under Brahminical guidance, but the caste also includes many sects or special cults. The one in question here is that of the Satpanth, which expression means the "truth faith." This cult is said to have been founded in the fifteenth century by a Mahomedan saint named Imamshah. He performed a miracle, which had the effect of converting a certain number of leva patidars to his teaching, and the cult has flourished ever since. Its headquarters are near Ahmedabad where the saint was buried, and his tomb is in charge of his descendants, described in the evidence as the "Syeds." A Hindu "kaka" or religious head of the sect also lives at Pirana and serves his co-religionists. A second seat of Satpanth is at a place called Bahadurpur. This was founded by a grandson of Imamshah and is called the new Satpanth.



Except for there being no Hindu teacher, it is, as far as we can gather, a portion of the main Satpanthi cult. Satpanthis are not born into the cult, but become so by initiation and the cult has some scriptures and also certain rites which are described in the evidence, and a comprehensive account of the cult and its history is also to be found in the Ahmedabad District Gazeteer.

The main question now agitating the leva patidar caste is one which we are not competent to decide. It is whether this cult is within the Vedic religion, or not? The leva patidar caste has decided that the Satpanthis are not Hindus and has outcasted them; and the two plaintiffs have sought redress through the Court. This has been denied them in the Court below, the learned trial Judge holding that the meeting which outcasted them was properly convened and regularly held. . . .

. . . [I]t is not cash the plaintiffs seek but the vindication of their position as Hindus.

The history of the caste schism goes back to plaintiffs' father's time. In 1905-06 the question of Satpanth was, as far as we are concerned, first raised. A very large caste meeting was convened at Padalsa, and it is contended for one side that the meeting condemned the cult itself as being extra-Vedic; and by the other, that all that was disapproved of was some of its practises which savoured of Muhammadanism. The Satpanthis of the day recanted either their belief or the practices disapproved of according to the view one takes and no one seems to have been excommunicated then. Unfortunately the caste resolution of 1906 is not available to us. The original is either lost or it has been suppressed by the defendants' side. A copy from the copy in the Faizpur caste drafter [archive] was tendered to the learned Subordinate Judge and rejected as inadmissible. We must gather the purport of the decision from some of the witnesses who were present, and here we think that a distinction has been drawn in the arguments which could hardly have been present to the caste meeting. The caste is one of cultivators, and as the record shows many of them are even now illiterate. We think they could hardly have distinguished between the dogma of the cult and certain of the practices of its followers. There is in any case a strong tradition in the caste that what was condemned in 1906 was the cult itself, and we think it must have been so.

After this nothing much in this connection seems to have happened in the caste, though plaintiff's father was fined Rs. 2,000 for not having closed the Satpanth dharmasala at Faizpur, as he had agreed to do. In 1919 it was



discovered that five or six castemen had again lapsed into the Satpanth cult. They were reported and outcasted on the basis of the resolution of 1906, and plaintiff Totaram himself took an active part against the backsliders in that year, see Exs. 51 and 52 signed by him as well as many others, reporting the names of these persons to the Kutumb-nayaks. Part of the arguments for plaintiffs is based on these letters as showing that what was then dealt with was the Bahadurpur Satpanth cult and not the old one; but the references to a new Satpanth, may only mean a new recrudescence of it. Nevertheless these five and others gave a caste dinner in the dharmasala of the cult at Faizpur, and his festivity led to 56 more persons of the caste of that place being outcasted, besides others from the neighbouring villages. It has been strenuously urged in this Court, as in the one below, that the five or six fresh Satpanthis were converts to the new and not the old Satpanthi; that is, the Bahadurpur one, but the learned Subordinate Judge has not accepted this argument. In fact there seems to be no real distinction between the two beliefs and we accept his view.

The large number of outcastes so created has led to difficulties in the caste over betrothals, marriages and the status of widows. We are told that betrothals have been denounced, marriages refused, and widows recalled to their parents' houses. It was to settle these difficulties that the caste meeting of 1922 was convened. The two plaintiffs were present at this meeting, and took with them to it their legal adviser, but this person not being a leva patidar was not allowed to address it. The plaintiffs themselves however did so. Their main contention was that the question whether their beliefs were extra-Vedic or not, had never been properly examined by any person competent to decide it, and they urged that it should be referred for the opinion of the Shankaracharya. But these arguments were brushed aside and they were told that if they wanted that authority's opinion, they could themselves procure it. The meeting passed six resolutions.

The record of its proceedings opens with a recital of its having been summoned. There is next a preamble stating that in connexion with Satpanth a meeting had been held in 1906, at which it had been resolved that the Satpanth religion was outside the pale of the Vedic religion, and that all persons of the caste should give it up. It next states that Satpanthis then confessed and abjured the cult: but that thereafter some persons had again gone back to it and had been outcasted, as had some more who had dined with the outcastes, and that for this reason marriage ceremonies of relatives of the outcastes were impeded, and in order to solve these difficulties the resolutions which follow were arrived at.



The first resolution recites that of those outcastes, some on purging their heresy have been readmitted, but that those who have not are outcasted as will be all who help them. The second resolution states that those who have formed marriage alliances (really arranged betrothals) with Satpanthi families are authorized to break them off. The third resolution states that widows in Satpanthi families may be recalled to their parents' houses. The fourth provides a time limit within which absent Satpanthis may recant and surrender to their village panchas, who shall transmit a list of such persons to the head panchas. The fifth requires the village panchas to explain the resolutions to absentees from the meeting and more particularly to the followers of the cult or those connected with them, or suspected of it, and to take and record their signatures. And the sixth directs the kutumb-nayaks at Padalsa to prepare a list of outcastes and of those who refuse to comply with the caste's decision, or to give effect at once to the letters of excommunication. Next comes a note evidently later than 3rd January, the limit for abjuring the cult, saying the lists have been received and annexing a list of those outcasted. The two plaintiffs were accordingly outcasted. This is a precis of the history of the plaintiffs' grievances.

There is no doubt that a properly assembled caste panchayat has jurisdiction to outcaste members of its community who have committed caste offences, and that when the panchayat's proceedings are in order and consonant to natural justice, Courts of law cannot by decree interfere with them. On their face these proceedings appear to be quite regular. They have been attacked on the grounds, that plaintiffs were not given an opportunity to show that their beliefs in fact were not repugnant to the Hindu religion, and that the meeting itself was not properly called, as notice of it was not sent to all the villages where leva patidars reside.

As to the first question it would, no doubt, have been within the competence of the panch to seek the opinion of the Shankaracharya or any other authority on the question, or to take evidence on it and so to decide the point, but Courts cannot lay down rules as to the procedure to be followed by a caste panchayat in such matters, which are for the panchayat itself. The Satpanth cult is in fact well known. There is a long account of it in the Gazetteer for the Ahmedabad District, and we do not suppose that its tenets were not known to the caste. Moreover, in 1906, there had clearly been a long debate about it, and the meeting



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in 1922 proceeded on the footing that that panchayat had already made a decree, and that what it was doing was the enforcement of this decree against backsliders and newly won adherents of the cult, who were offered an opportunity to recant, the alternative being to leave the caste. We think there was jurisdiction to act as the panchayat did.

As to the second objection, the system of convening meetings has been described. Messengers were sent with a notice of it to a certain number of villages, the leading man in each of which had to endorse the messenger's book with a kind of receipt of the notice. In other cases, according to the evidence "chits" were sent to villages where weekly bazaars are held, and post-cards to distant ones, and the villages in Berar got notice through the kutumb-nayak of Datala which is apparently their headquarters. These were the customary modes. According to the plaintiff there are ninety-seven villages in Khandesh and sixty-seven in Berar and Nemad where Leva pitadars live, but some are probably only hamlets and the number must vary from time to time. There is in fact no real census, and no good ground on which to find on this point. The learned Subordinate Judge thought that the Satpanthi groups refused to acknowledge the notice and to sign the book, but found that eighty-four villages got notice, through the thakoors or messengers and that the representatives of eighty-seven villages were, in fact, present at the meeting of 1922.

Here again it is clear that the standard of notice of a caste meeting cannot be that of a civil Court to a party to a suit; and that if it is found that actually there was a widespread notice of a meeting in the customary way enabling a substantial proportion of the caste to attend, the requirements of natural justice are broadly satisfied, and this is the learned Subordinate Judge's finding, with which we are not prepared to interfere. But the learned Subordinate Judge has also found that though allegations as to the irregularity of the meeting are now made, this is an after thought, and that at the time no protest on this point was made as appears from Ex. 140, which was a pamphlet published afterwards as an appeal to the whole of the Hindu community, with a full statement of the Satpanthi's position, the point taken in it being, not that the meeting had been irregularly convened, but that it had refused to listen to arguments, or to consult the Shankaracharya. In fact, the finding is that the panchayat's jurisdiction had been submitted to by the plaintiff. We agree. But even had this not been the finding as to the jurisdiction of the panchayat and the regularity of its proceedings, we think

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that on the frame of the suit it was not possible to give the plaintiffs any relief. The defendants are said to have been impleaded as being leading men of the caste, and some of them have said in their written statements that they voted against the proposal that the two plaintiffs and others be outcasted because they were Satpanthis, and that they were overruled by the majority.

Had the suit been framed for damages for slander, it might have been possible in certain circumstances to give the plaintiffs decrees on that basis, against persons who took part in the defamatory proceedings; but such suits were time-barred when these were brought. Had the suits been for declarations that the proceedings of December 1922 were void, and had they been brought against the defendants as representatives of the caste, some other remedy might have been open to the plaintiffs. But, on the facts, even had the plaintiffs been able to show that the panchayat meeting of 1922 had no jurisdiction and had been irregularly convened and had decided in contravention of the rules of natural justice, we feel that no relief could have been given to the plaintiffs. In Appeal No. 289 plaintiff Devchand Totaram's grievance is that defendants have denied his civil rights of managing and supervising the caste property and caste funds, for which wrongs he claimed Rs. 3,000 damages; and Rs. 2,250 for the defendants having broken the marriage engagements of his sons and daughter (the actual persons breaking off the betrothals being defendants 1, 2 and 3).

But in the course of the trial of the suits, as appellants' learned counsel, Mr. Jayakar, admitted, the questions of caste rights and damages were lost sight of--there is nothing to show that every leva patidar has as by birth-right a part in the management of caste property, or caste funds, if there be any--for these must clearly be managed by some sort of a committee to which a particular leva patidar may never be nominated or elected, and at most the right would be some sort of voice in such nomination or election; but there is no evidence as to how caste funds are managed, or to show that the plaintiffs were ever excluded from management, or denied the right of supervising the funds. The grievance as to the breaking off of betrothals is rather like a suit for damages for breach of promise of marriage; but this is another of the pleadings which seems to have been forgotten at the trial and there is no issue upon it and no finding.

Plaintiff Totaram Badhu's suit is similar, though the damages are put at Rs. 30,000. In the plaint the cause of action is that the defendants have unjustly and without any justifiable reason outcasted the plaintiff, and so deprived him of all his civil rights appertaining to the community, and his right to look at or scrutinize the caste fund accounts. But there is nothing to show what the funds are, and what the accounts may be; or evidence to prove



that he has ever been refused any such rights. It may of course be said that the act of outcasting the two plaintiffs itself involves a loss of these privileges, but we think that something more is needed. There must clearly be an occasion in each case in which the plaintiff sought to exercise these rights and were refused, and the remedy would clearly be a declaration and injunction against the caste as a whole, sued in a representative suit, but this is not what has been sought. But even such a declaration and injunction seem to be ineffective remedies in the case of such shadowy and vague rights as the plaintiffs have sought to enforce.

The learned Subordinate Judge seems to have been unnecessarily harsh to plaintiff Totaram--he has applied to him the, as far as we can see, undeserved epithets of bare-faced liar, turn-coat, time server and thorough hypocrite, while though he may have been inconsistent, he and the second plaintiff are really fighting on a point of faith. It is not for the Courts to decide, as the learned Subordinate Judge has nevertheless done, that the Satpanth cult is abhorrent to the feelings of the leva patidar caste as a whole. That is a question for the caste itself, and we think that it has decided it, and that its procedure in coming to a decision was not so irregular and contrary to the dictates of natural justice, and that, however the plaints may be framed, what they raised was really a caste question outside our purview. We think the plaintiffs must fail. We confirm the lower Court's decree and dismiss these two appeals with costs.

.....

[The concurring opinion of Barlee, J., is omitted.]

NOTE: Is this result consistent with the notion that castes are like voluntary associations? Does it turn on any view of what Hindus are? Are there any substantive requirements beyond fair procedure? Does such a rule bolster or undermine orthodoxy? Impose or prevent majority rule? Encourage or stifle innovation?

Suppose the caste had "split" and one section claimed that a meeting called by the other section was no longer binding on them? Would the disposition of the offices and property of such a caste fall within the protected sphere of caste autonomy? See Fulchand Mohanlal v. Harilal Nauso, (I.L.R.) 50 Bom. 124 (1925).

* * * * *



GOVINDA AMRITA AND OTHERS, Accused--Applicants v.

EMPEROR

A.I.R. (29) 1942 Nagpur 45

Vivian Bose J.

Criminal Revn. Appln. No. 29 of 1941, Decided on 22nd March 1941, for revision of order of Sess. Judge, Akola D/-14th December 1940.

Order.--This is an extraordinary case in which the applicants have been ordered to execute bonds under s. 107, Criminal P.C., to keep the peace for a period of one year. It appears that there are two parties in the village Sawangi and its suburb Wagjai. The complainants belong to the one which consists of Tekales who are Marathas by caste. The applicants belong to the other. They are Wanjaris by caste and are sub-divided into Sanap and Mundha Wanjaris. The trouble between the parties arose out of what has been described as the manpan of the village at festival times. Exactly what this manpan is has not been satisfactorily explained to me, but it has been translated by the learned Sessions Judge as a "right to respect." The complainants' case is that they have the exclusive claim to this "right to respect" of the village at festival times and that the applicants have no right or claim to it. It is contended that recently the applicants have been trying to usurp this right and that this is likely to lead to a breach of the peace. Action can only be taken under s. 107 if one of three things is present. There must be either (1) a likelihood of the person proceeded against committing a breach of the peace, or (2) disturbing the public tranquillity, or (3) doing any wrongful act which may probably occasion a breach of the peace or a disturbance of the public tranquillity. It is not suggested that the first two grounds are present in this case. The lower Courts have proceeded solely on the ground that the applicants are doing, or are likely to do, a wrongful act which may probably occasion a breach of the peace. The order of the first Court is in these terms:

I do not think that the Sanaps and Mundhes have any right in the manpan. It is clear that they want to enjoy manpan at these festivals separately Tekales (the complainants) are bound to prevent them from enjoying the same. So these actions on the part of the non-applicants are likely to lead to the breach of the peace.

The learned Sessions Judge concurring with the first Court states:

It was however urged in the appellants' behalf that as separate enjoyment of this right was an act which was lawful in itself, there



was no reason for proceeding under S. 107, Criminal P.C., even though that act was likely to induce the other side to commit a breach of the peace. In other words, the contention was that law-abiding citizens should not be bound over because of the injured susceptibilities of the patel. To this the short answer is that the community to which he belongs namely the Tekales (Marathas) have the sole right of manpan and, if the Sanaps and Mundhes have, as they will have, a separate manpan they will be committing a wrongful act which will in all probability be responsible for a breach of the peace.

It is hardly necessary to cite cases for the position that if a person intends to do a lawful act then the mere fact that somebody else threatens to prevent the performance of that act and thus threatens to create a breach of the peace is no ground for binding over under s. 107 the person wishing to perform the act. There are numerous cases to that effect. . . [Citations omitted]. The question therefore narrows itself down to this: Is it wrongful for the Wanjaris to exercise the right of manpan in the village during village festivals provided they in no way interfere with the celebrations and the right of the other side? There is no allegation that the applicants are in any way interfering with the celebrations conducted by the other side. The only complaint is that they take out separate processions and celebrate the festivals separately at a different place and time. They in no way try to make their own festivals clash with those of the complainants. This in turn narrows down to whether the complainants have the exclusive right to manpan in the villages. Both the lower Courts hold that they have. That, however, depends upon whether the right claimed is one which the law will recognize and uphold.

The right to manpan was considered in 3 N.L.R. 131,¹ and Batten A. J. C. held that no civil suit lies to enforce such a right. He held that the rights claimed were mere symbols of recognition and marks of respect and as such were not capable of being enforced in a civil suit. It is clear then that this is not the kind of right which the law recognized as being capable of possession by any individual. It follows that no individual can claim the right to its exclusive possession or use. The law will always enforce any right which can be legally claimed or possessed, or made use of. Therefore, if it declines to enforce a claim to rights of this kind it can only be because it does not recognize the right as a kind of right which can be legally possessed or made use of. It is difficult to see how any person or group can claim the exclusive right to the respect of his or their fellows. It is also difficult to see how

¹(1907) 3 N.L.R. 131, Shiwaji v. Mahadeo.



any person or group can object to others celebrating festivals in their own way provided of course these others in no way interfere with the separate and different celebrations which such person or group may choose to make. Here the persons who threatened to commit a breach of the peace are not the applicants, who, in my opinion, have every right to celebrate these festivals and to obtain any respect which others voluntarily choose to give them, but the complainants, who claim the right to stop them and who threaten to do so forcibly.

It is astonishing to me that such a claim should be seriously litigated in the Courts, and still more astonishing that Judges should be found to uphold it. Even in religious matters which are far more deeply ingrained than a semi-religious custom of this kind the right of dissent has always been recognized and upheld. No one, save a Sovereign, has ever been allowed to claim that he alone has the exclusive right to the homage and respect of his fellow beings. That is a purely social or religious affair which in this country is left to the free volition of each individual. The sanctions against breach of such customs are social ostracism or outcasting or excommunication--not legal. If the act complained of is not wrongful in itself it cannot become wrongful because somebody else's susceptibilities are likely to be hurt. It will be impossible for the country ever to advance if we are all to be tied down for ever to each and every custom which has obtained in the past without being given a right to secede or dissent.

Is it then wrongful for a person or group to hold his or its own celebrations in an orderly and peaceful way and to exact such "respect" as others choose voluntarily to render? It is clear that these celebrations are not wrongful in themselves because it is recognized that the complainants have the right. They can only become wrongful if this right is exclusive to the complainants. But as I have said the rulings show that the law will not enforce any such claim, therefore it is clear that these rights, if any, must be enforced by social or caste sanctions and not by the processes of the law. If any person threatens to interfere by force or to resort to such means as the law considers illegal then it is he who is in the wrong and it is he who should be bound over. The leading case on this branch of the law is [Beatty v. Gillbanks,] (1882) 9 Q.B.D. 308 = 51 L.J.M.C. 117 at p. 120, and the principles on which the law is founded are to be found lucidly expounded in Dicey's Law of the Constitution, pp. 268 to 273.



Lest I be misunderstood, I make it clear that I am not casting any doubt upon the right and powers of the authorities responsible for the maintenance of law and order to resort to emergency measures to prevent an immediate and imminent breach of the peace and so forth. The rights of the individual have to give way in such emergencies to the paramount necessity for preserving the King's peace. This is also expounded by Dicey from p. 273 onwards. But I am not immediately concerned with that. The applications are allowed and the orders of the lower Court are set aside. The bonds, if executed, will be cancelled.

Applications allowed.

NOTE: Does the result here comport with the earlier cases? Does the fact that manpam cannot be "legally possessed or made use of" distinguish it from the temple cases? Does the distinction reflect a Hindu or Indian notion? An English one? Would the earlier cases have been the same if the judges shared the concern of Bose, J. for voluntarism and innovation?

Would a right to use a well be more like the temple or like manpam? In Mariappa Nadan v. Vythalanga Mundaliar, 1913 M.W.N. 247, Nadars [Shanars] sought to obtain a declaration of their right to use a tank and a well. Defendants claimed that the tank and wells were dedicated to the use of higher castes. The Madras High Court conceded that courts should not interfere with crystallized rigid custom, but that it might refuse to recognize "usages which had lost their original binding force and are sought to be revitalized by . . . factions or sectarian spirit." Those customs which were not too irrational or immoral and had been definitely and clearly established for very long periods should be enforced. But in regard to the purity of water, the court cites Hindu texts on purification to the effect that the size of the body of water is an important factor. The lack of textual requirement of exclusion in a body of water of this size contributed to the courts finding that defendants hadn't proved that the well was dedicated "either by express dedication or by long practice, acquiesced in by the other castes and communities to the exclusive use of the higher castes among the Hindu community." So the plaintiffs obtained a declaration of their right to use the tank, but were excluded from drawing water from a well on the ground that a custom of exclusion was proved there.

Compare Narhari Domodar Vaidya v. Bhimrao Ramji Ambedkar, A.I.R. 1938 Bom. 146; Kazan Chand v. Emperor, A.I.R. 1926 Lah. 683, A.I.R. 1927 Lah. 430.

* * * * *



NOTE ON PART II: Does the judicial treatment of caste during this period show more or less deference and respect to caste groups than did the courts in Part I?

Do the rules established by the courts express Hindu notions? English ones? A new amalgam?

What is the effect of these rules on the mobility of caste groups? Of individuals? What is their effect on innovation within castes? Do they give room for caste groups to change in character and function? Does having such a body of rules tend to make caste groups more similar to one another? Or does it encourage them to be distinctive?

To what extent do the courts recognize an overarching sacral order of Hinduism? Are the prerogatives of caste groups based on their position in such an order? Or on their character as private associations? Or their own corporate character as sects (i.e., dissenting churches).



1965 -Galanter-Legal Material -Devchand Totaram Case (886)

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THE UNIVERSITY OF CHICAGO

The College

Introduction to the Civilization of India

LEGAL MATERIALS FOR THE STUDY OF MODERN INDIA

Compiled and edited by

Marc Galanter

PART III

Law and Traditional Society in Independent India:

Caste, Religion and Hereditary Rights Under the Constitution

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PART III

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PART III

Law and Traditional Society in Independent India:

Caste, Religion and Hereditary Rights Under the Constitution

The Constitution of India came into force on January 26, 1950. The Constitution establishes a secular federal republic with a parliamentary system in the British style and a strong central government. The framers of the Constitution rejected various proposals to construct a government along "indigenous" lines. The Constitution establishes more powerful legislatures at the Center and in the States. It also established a unified judiciary, covering the whole of India, under a Supreme Court as a court of final appeal in all cases.

The Constitution includes a bill of Fundamental Rights (Part III), enforceable by the judiciary, to which all governmental regulation and all laws in every part of India must conform. It also contains a set of Directive Principles of State Policy (Part IV), which are not enforceable by the judiciary, but are meant to serve as a guide to legislators. The Fundamental Rights contain prohibitions against government restriction of freedoms of religion, speech, press, association, movement, etc. They also enjoin government to be indifferent to particularistic and ascribed characteristics such as religion, caste, place of birth and sex in its dealings with citizens. The Directive Principles call for the reconstruction of Indian society and government along the lines of a modern welfare state.

In the following cases, we shall be looking at the relation of the modern legal system, with its constitutional capstone, to traditional networks of rights and obligations. Which groups does it help? Which does it hurt? What new kinds of rights are enjoyed and by whom? What old rights are no longer available? Is there room for the assertion of traditional rights. If so, are they now to be asserted or defended by new methods? What effect do these new methods have on Indian society? In what respects, if any, can these changes be characterized as a move from status to contract?

The cases here deal with three general themes: first, caste; second, religion; and finally, other hereditary rights. As we shall see, these are not distinct but to some extent merge with one another in the cases.



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III - 2

THE CONSTITUTION OF INDIA

(Selections)

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY, of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

PART III

FUNDAMENTAL RIGHTS

General

12. In this Part unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,--

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

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Right to Equality

14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to--

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

¹[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

¹ Added by the Constitution (First Amendment) Act, 1951, s. 2.

In its application to the State of Jammu and Kashmir, reference to Scheduled Tribes in cl. (4) of art. 15 shall be omitted.



Constitution of India Selections

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

18. (1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

19. (1) All citizens shall have the right--

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and
- (g) to practise any profession, or to carry on any occupation, trade or business.



Constitution of India Selections

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,--

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.]

1. Subs. by the Constitution (First Amendment) Act, 1951, s. 3, for certain original words.



20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply--

- (a) to any person who for the time being is an enemy alien; or
- (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless--

- (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

- (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).



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(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in the clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe--

- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Right against Exploitation

23. (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Right to Freedom of Religion

25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.



(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law--

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.--The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.--In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right--

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

28. (1) No religious instruction shall be provided in any education institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such persons is a minor,



his guardian has given his consent thereto.

Cultural and Educational Rights

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Right to Property

31. (1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.



(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect--

- (a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or
- (b) the provisions of any law which the State may hereafter make--
 - (i) for the purpose of imposing or levying any tax or penalty, or
 - (ii) for the promotion of public health or the prevention of danger to life or property, or
 - (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

31A. (1) Notwithstanding anything contained in article 13, no law providing for--

- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or



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- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
- (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease, or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article,--

- (a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any ianmam right;
- (b) the expression "rights", in relation to an estate, shall include and rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raivat, under-raivat, or other intermediary and any rights or privileges in respect of land revenue.

31B Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.



Right to Constitutional Remedies

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

35. Notwithstanding anything in this Constitution,--

- (a) Parliament shall have, and the Legislature of a State shall not have, power to make laws
 - (i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and
 - (ii) for prescribing punishment for those acts which are declared to be offences under this Part;



and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

- (b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation.--In this article, the expression "law in force" has the same meaning as in article 372.

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

36. In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.

37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

39. The State shall, in particular, direct its policy towards securing--

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;



(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. The State shall endeavour to secure, by suitable legislation or economic organisation or in another way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

44. The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.



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48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

49. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

50. The State shall take steps to separate the judiciary from the executive in the Public services of the State.

51. The State shall endeavour to--

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

325. There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

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1965 -Galanter-Legal Material -Devchand Totaram Case (886)

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A. Caste Under the Constitution

STATE v. BANWARI

A.I.R. 1951, Allahabad 615

Desai, J.

Order. -- This is an appln. by seven men, five of whom are barbers and two, dhobis, from their conviction under s. 6, U. P. Removal of Social Disabilities Act, XIV [14] of 1947. It is laid down in s. 3 of the Act that no person shall

refuse to render to any person merely on the ground that he belongs to a scheduled caste, any service which such person already renders to other Hindus on the terms on which such service is rendered in the ordinary course of business;

any
/person contravening this provision is liable to be punished under s. 6 with imprisonment and fine. It has been found by the Cts. below that the appcts. refused to shave and wash clothes of Chamars. On the passing of the Act the Chamars served a notice upon the barbers and the dhobis of the village calling upon them to render service to them. When they did not agree, a Panchayat was called by the Chamars, it was attended by the appcts. In the Panchayat the Chamars and other people assembled there, asked the appcts. to render service to the Chamars. The Chamars had brought bundles of clothes to be washed. At first the appcts. agreed to render service and even accepted the bundles of clothes for washing. Then they said that they would reconsider the matter, held consultation with one another at some distance from the Panchayat, returned and told everybody that they had decided not to render service to the Chamars and returned the bundles to them. They were pressed to reconsider that decision but they remained adamant and the Panchayat broke up. It is this refusal which was the subject-matter of their prosecution.

[2] It was contended that there was no refusal actually to render service to the Chamars and that what the appcts. did was to refuse to agree or promise to render service. It was pointed out that no request was made to the appcts. to render service there and then and that the Panchayat was called simply to obtain an agreement from them that henceforth they would start rendering service. When they refused, it amounts to their refusal to agree to render service in future and not refusal to render service there and then. It was pleaded that this was no offence of refusal, or even an attempt to refuse to render service but was, at the most, a threat or preparation to refuse to render service. It if was only a threat or preparation to refuse to render service, undoubtedly, it would not amount to an offence. The evidence, that has been believed by the

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Courts below, is that the bundles of clothes were actually offered to the dhobis and that they had refused to accept them. So in the case of the dhobi appcts. there was a refusal actually to render service and not merely a threat of, or preparation for, a refusal. The evidence is that the dhobis accepted the bundles and then refused. It does not matter which dhobi accepted the bundles because the final refusal was by all. By the refusal they undoubtedly committed the offence. But the case of the barbers is different; they were not called upon to shave any of the Chamars there and then; they were simply asked to agree to shave them in future. So their act of refusal was simply a threat or preparation to commit the offence. They had plenty of locus poenitentiae and even after their refusal in the Panchayat it was open to them when they were asked actually to shave the Chamars. So no offence was committed by the barbers by their refusal in the Panchayat.

[3] The reasons given by the appcts. for their refusal were that if they rendered service to the Chamars other Hindus would not accept service from them and they would lose their custom. It was urged that the refusal on this ground is not refusal merely on the ground that the Chamars belong to a scheduled caste. It is true that the appcts. did not say, in so many words, that they were refusing to render service because the Chamars belong to a scheduled caste, but that undoubtedly was the ground, and the only ground, of their refusal; because the Chamars and the appcts. would lose custom of the other Hindus. The loss of the custom of the other Hindus would be a consequence only of the fact that the Chamars belong to a scheduled caste. So when the appcts. said that they would not render service because otherwise they would lose the custom of other Hindus, it meant that they would not render service because the persons demanding it belong to a scheduled caste.

[4] No prosecution witness stated anything about the terms on which the service was demanded from the appcts. and it was contended that the prosecution failed to show that they had refused to render service on the same terms on which they were rendering it in the ordinary course of business. When in the Panchayat the appcts. were asked to render service, it was presumed by everybody that they were asked to render it on the same terms on which it was rendered in the ordinary course of business. The Chamars did not ask for any special or favourable terms. There was no discussion about the terms because the appcts. flatly refused to render service. They were not prepared to render service on any terms and that is why there was no discussion of the terms. They did not ask for any terms which might have been refused by the Chamars. There is no doubt, the appcts. refused



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to render service on the same terms on which they were rendering it in the ordinary course of business.

[5] Mr. Saksena referred to Art. . . . 23 of the Constitution. . . . Article 23 is to the effect that "traffic in human beings and begar and other similar forms of forced labour are prohibited." The passing of the U. P. Act does not contravene this Article at all. When the Provincial Legislature laid down that nobody shall refuse to render service merely on the ground that the person demanding it belongs to a scheduled caste, it does not mean that it has infringed the prohibition on "begar and other similar forms of forced labour." When a person is prohibited from refusing to render service merely on the ground that the person asking for it belongs to a scheduled caste he is not thereby subjected to forced labour similar in form to begar. Therefore I do not see any illegality in the Provincial Act.

[7] In the result I allow the appln. of Banwari, Mul Chand, Babu Ram, Ram Din & Babu Ram, set aside their conviction & sentences & acquit them. If they have paid up the fine, it shall be refunded. I maintain the conviction & sentences of Bahadur and Nanhu and dismiss their appln.

Application allowed.

NOTE: Suppose the barbers had argued that they were being deprived of their right to carry on their business as guaranteed by Art. 19 of the Constitution. See Banamali Das v. Pakhu Bhandari, A.I.R. 1951 Cal. 167. Compare the situation of the barbering trade now with that in the earlier cases in Part I. Have we gone from status to contract? To what? Cf. the American case of Sellers v. Philip's Barber Shop, (New Jersey Dept. of Law and Public Safety, Division on Civil Rights, 1964) 9 Race Relations Reporter 1995.

The Abolition of 'Untouchability.' The first measure outlawing the imposition of disabilities on 'untouchables' was the Madras Removal of Civil Disabilities Act of 1938. Between 1947 and 1950, almost all of the Provinces passed such measures, varying in detail. The U.P. Act here is one of these. The Constitution, which came into effect on 26 January 1950 provided:

Art. 17. 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offense punishable in accordance with law.

The Constitution gives Parliament exclusive power to provide such punishments and saves existing state law until Parliament shall do so. Art. 35. In 1955, Parliament did so and passed the Untouchability (Offences) Act (XXII of 1955).

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The Act outlaws the enforcement of disabilities "on the ground of untouchability" in regard to, inter alia, entrance and worship at temples, access to shops and restaurants, the practice of occupations and trades, use of water sources, places of public resort and accommodation, public conveyances, hospitals, educational institutions, construction and occupation of residential premises, holding of religious ceremonies and processions, use of jewellery and finery. Imposition of disabilities is made a crime, punishable by fine of up to Rs. 500, imprisonment for up to six months and, where appropriate, cancellation or suspension of licenses and of public grants. The Act also withdraws the power of civil courts to enforce any claim or recognize any custom, usage or right which would result in the enforcement of a disability. And, unlike the previous provincial acts, the UOA punishes indirect social support of 'untouchability.' The use of social boycotts against persons who exercise rights under the Act, the use of sanctions (including excommunication) against anyone on the ground that that person refused to practice untouchability, and the instigation of the practice of untouchability in any form, are likewise prohibited and penalized.

How would you assess the possible effectiveness of such an Act in regard to a government school? a licensed public restaurant? a group of villagers at the well?

Note that boycotts and indirect social support of untouchability are themselves offenses. Would you suppose this makes enforcement easier?

Note that it is an offense to impose disabilities only if the denial of service, etc. is "on grounds of untouchability." Motives are hard to prove in court, but not impossible. Does this provision help?

Where any act constituting an offence under this Act is committed in relation to a member of a Scheduled Caste. . . the Court shall presume, unless the contrary is proved, that such act was committed on the ground of "untouchability." (UOA, Sec. 12)

How do you prove the contrary? Not, as was tried in the Banwari case, by proving that you are responding to some economic detriment or reprisal that would follow giving the service. But suppose a hotel proprietor puts up a sign to the effect that he serves only Brahmins, Thakurs, Vaishyas, Kayasths and Yaduvanshis? See the ruling of the Allahabad High Court, 6 February, 1957, reported in the Indian Civil Liberties Bulletin, iv; 255 (Mar., 1957).

There are somewhere in the range of 500 prosecutions under the Act registered each year. Why so few? Is the following plausible?

The small number of prosecutions under the UOA . . . is not in itself an indication of the effectiveness of the Act. Most of the incidents that come to the attention of the police are probably settled without being registered as cases. Undoubtedly the total effect of the Act as propaganda, as threat and as leverage for securing the intervention of political and executive figures outweighs the effect it has as an instrument for prosecution of offenders. But its effectiveness as a threat and as a political leverage depends in part on its efficacy as a penal provision. In this respect it has serious



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shortcomings. The effectiveness of the Act depends upon the initiative of the local police and the sympathy of local magistrates, both of whom have obvious reasons to be disinclined to antagonize the dominant elements in the community. Complainants and the witnesses they need to prove their cases are vulnerable to intimidation and reprisal. Although boycotts and reprisals are themselves offenses, they are by their very nature even more difficult to prove than the original offense. Untouchables are often only dimly aware of their rights. There is considerable delay in the disposition of cases; defendants usually have greater resources and can hold out longer. The untouchables are often too poor to engage lawyers; and lawyers, dependent on the patronage of landowners, are reluctant to take such cases. The penalties imposed upon conviction have very often been so low as to have little deterrent effect.

Does the abolition of untouchability mean that one cannot treat another as ritually unclean or polluting in any circumstance? Mourners and menstruating women? Persons of another religion? Can Jains exclude non-Jains? See Devarajian v. Padmanna, A.I.R. 1958 Mys. 84. Persons who have been excommunicated for some moral offense? See the next case.

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PADURAM SAHU AND OTHERS, Petitioners v.

BISWAMBAR SAHU, Opposite Party

A.I.R. 1958 Orissa 259

R. L. Narasimham C. J. (17-7-1958)

ORDER:--This is a revision petition against the appellate judgment of the Sessions Judge of Bhawanipatna, maintaining the conviction of the petitioners under S. 500 I.P.O.* and the sentence of fine of Rs 60/- passed on each of them by a First Class Magistrate of Nawapara.

(2) The six petitioners are all Thelis [oil-men] living in village Jinjera, P. S. Jank, in Nawapapr Sub-division of Kalahandi District. In Baisakh of 1954 the marriage of the niece of one Udiram Sahu (P. W. 2) of Dumirpani village, in P. S. Jank, with the son of one Sakhi Chand Sahu (P. W. 3) of Jinjera took place. The said Sakhi Chand is the Sammandhi of the complainant Biswambar Sahu. Along with the 'Barat' party of Sakhi Chand the complainant Biswambar Sahu and other relations of his went to Dumirpani, to the house of Udiram Sahu for the purpose of the marriage. It was learnt that a letter (marked X) had been sent to Udiram Sahu by the petitioner in which it was alleged that the complainant Biswambar had been outcasted by his caste people and also by the people of his basti [hamlet or village] for about two and a half years.

Udiram Sahu naturally got very much perturbed on receiving this letter inasmuch as, if the allegations contained in it were true, it might mar the marriage celebrations. Hence he insisted on Sakhi Chand depositing with him a sum of Rs. 20/- as advance for meeting any contingency that might arise. Subsequently another meeting of the caste panchayat was held in which also it appears that the allegation that the complainant was outcasted for assaulting a Gond woman was found to be true. In consequence of this decision the complainant lost the services of the

*The Indian Penal Code provides:

Section 500: Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Section 499: Whoever . . . makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Ninth Exception.--It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith, for the protection of the interests of the person making it, or of any other person, or for the public good.

Tenth Exception.--It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.



village barber and the village dhoby and was put to much humiliation by being boycotted by his villagers, Hence he brought a criminal case against the petitioners for an offence under S. 500 I.P.C.

(3) The main defence of the petitioners was that the allegations contained in the letter (marked X) were true, that the complainant had been boycotted by his villagers on account of his having assaulted a Gond woman and that they in good faith sent the letter to Udiram Sahu on the eve of the marriage so that the marriage celebrations may not be marred if this matter came to light in the midst of these celebrations. They claim that their letter was covered by the 9th and 10th exceptions to S. 499 of the Indian Penal Code. They also examined several defence witnesses to prove the assault by the complainant on the Gond woman in 1952 and his subsequent ex-communication from society.

(4) The trial court disbelieved the defence witnesses examined to prove the truth of the allegations contained in the letter (marked X). He therefore thought that the petitioner did not act in good faith and as such the 9th and 10th exceptions to S. 499, I.P.C. would not apply.

(5) The lower appellate Court however misconceived the law on the subject. He did not critically examine the evidence of defence witnesses with a view of ascertaining whether in fact the complainant had been ex-communicated by his own castemen sometime in 1952 on account of his assaulting a Gond woman. He thought that even if the accusations made in the letter (marked X) were true it would still amount to defamation unless it could be shown that the letter was sent for the good of the person to whom it was conveyed or for the public good. In this view of the law he did not carefully examine the evidence of the defence witnesses but held that the petitioners failed to prove their bona fides and that their action would not be covered by any of the exceptions to S. 499, I.P.C.

(6) The lower appellate Court has clearly committed an error. The petitioners are not busybodies gratuitously interfering with the affairs of other persons. The complainant himself admitted in cross-examination that the petitioners are the Mukhias of the Tehlis of the village. Udiram Sahu (P. W. 2) is also a leader of the Thehis of Dumirpani. If as a fact the complainant had been outcasted by the Thehis on account of his misconduct on a previous occasion the headmen of the Thehis of his village were under a social obligation to mention this incident to other prominent Thehis of the locality so that any function in their houses may not be marred and they may not be put to expenditure if someone objects to the presence of the complainant there.



It is true that the Constitution does not recognise caste but social customs have not changed notwithstanding the provisions of the Constitution and if a person, in good faith, publishes any letter containing defamatory matter in the interests of the other members of his caste, he cannot be held guilty of defamation. Thus in *Umed Singh v. Emperor*, A.I.R. 1924 All. 694 (1) (A), it was held that where a person was outcasted and the accused informed some persons of his caste not to take water from the hands of that person and that if they did so they would be excommunicated no offence of defamation was committed. In *Bhagawant v. Emperor*, A.I.R. 1933 Oudh 377 (B), it was held that as the caste punchayets in India exercise a beneficial effect by controlling the social behaviour of the members of its caste any member of a caste who brings to the notice of the Punchayet the commission of a social offence by another member of that caste will not be guilty of defamation unless the accusation itself is found to be false.

In *Haripad v. Emperor*, A.I.R. 1930 Cal. 645 (C), the same principle was reiterated and it was held that the imputation against a person which leads to his ex-communication from his caste is defamatory if he is not guilty of the act alleged against him. In *Manna v. Ram Ghulam*, A.I.R. 1950 All. 619 (d), it was further held that the communication of a caste resolution ex-communicating a member of a caste, by one of the members of the caste to the other members is covered by exception 9 to S. 499, I.P.C., inasmuch as every member of that caste is bound both in his own interest and in the interest of his caste to publish the resolution, for saving himself and the caste from the defilement which would take place by acting against the verdict of his own ex-communication.

(7) Hence, if as a fact the complainant had been excommunicated sometime in 1952 for some social offence by members of his own caste the Mukhias of his village were, in duty, bound to report this fact to the other prominent members of their caste in the interest of all of them. Under these circumstances their good faith is apparent and both the 9th and 10th exceptions to S. 499, I.P.C. would apply. In some cases even if the allegations against the person ex-communicated are not found to be true yet the good faith of the persons disseminating such allegations may be inferred if there are reasonable grounds for those persons to believe, after due care and attention, that the allegations were true. All that the 9th and 10th exceptions to S. 499, I.P.C. require is that there should be good faith, i.e. the imputation must have been made after due care and attention even though on further searching investigation it may not be found to be true.

(8) At this stage I may quote the material extracts from the offending letter:

"The purport of this letter is that Biswamber Sahu (complainant) has been excommunicated (chandiya) by our caste-people and also by our basti people for



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the last two and a half years. In spite of that he has been taken in the marriage party by Sakhi Chand. Hence we send this complaint to you for a full enquiry as you happen to be an experienced sarpanch. What more can we write? You are an extremely capable person."

(9) The petitioners sought to establish the truth of the allegations contained in this letter by examining six witnesses of whom five are residents of village Jinjera. Two of them, namely DW's. 4 and 6 are the barber and the dhoby of the village respectively. The other three witnesses (D.Ws. 1, 2 and 3) spoke about the ex-communication of the complainant Biswambar Sahu after full enquiry by the villagers sometime in 1952 for his having assaulted one Budhiarin Gondani of their village. D. W. 6 is a resident of Dumripani, the village of Udiram Sahu. He also spoke about the fact that at about that time news of the ex-communication of the complainant had reached his village also and when he questioned the complainant the latter replied that he did not attend the caste meeting. The trial Court disbelieved all these witnesses for reasons which are not very convincing.

He thought that the Gond woman should have been examined in support of the allegation of ex-communication. One cannot expect the woman, who (according to the evidence) was also ex-communicated to come forward to depose about her own disgrace. He has given no reasons for disbelieving D.W. 2, or D.W's. 4 and 5 (the barber and the dhoby). He has also overlooked some damaging admissions made both by P.W. 1 (the complainant) and by P. W. 2 in cross-examination. Thus P. W. 2 stated that though the complainant had not been ex-communicated by his castemen he was boycotted by his villagers. The subtle distinction between boycott and ex-communication is quite unreal in the present case. Moreover this witness further admitted that in the second punchayat held after the marriage ceremony in the house of P. W. 2 was over, the allegation that the complainant had assaulted the Gond woman was found to be correct.

Doubtless this Court is not bound by the opinion of the punchayat as to the truth or otherwise of the allegation made against P. W. 1 but the fact that several members of the complainant's own caste thought that the allegations were true would justify the plea of good faith taken by the petitioners. P. W. 1 though denying the fact of his ex-communication admitted that during the Sakhati day ceremony in his house none of his caste-children joined him for the last three years. He also admitted that he could not join the funeral ceremony of Khasa's mother as he had been barred by the petitioners. These guarded admissions of even

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the prosecution witnesses including the complainant would seem to support the evidence of the defence witnesses to the effect that a caste punchayet was held sometime in 1952 and the complainant was boycotted for having assaulted a Gond woman. The petitioners were therefore entitled, in good faith, to believe that the allegations were true and to communicate the same to their fellow-casteman (P. W. 2) at Dumripani with a view to save the marriage function in his house from ending in a fiasco; such communication was necessary in the interest of P. W. 1 himself.

(10) I would therefore allow this revision petition, set aside the conviction and sentence and acquit the petitioners.

Revision allowed.

NOTE: Here we are with a situation not too dissimilar from that in Hurrukchand's case (i-1). In what ways, if any, has the judicial view of caste tribunals changed? Is the integrity of the caste group considered to be in the public interest? Compare the views on communal integrity expressed by the majority in Bhau Ram's case, below. Note the emphasis here on the caste protecting itself from "defilement"! Was this a significant factor in the earlier cases?

Does one have a larger right to protect against defilement of those within one's caste than by outsiders. Compare Art. 15(2).

If there is a question of defilement, should Art. 17 (abolishing untouchability "in any form") be relevant here? In Hadibandhu v. Banamali, A.I.R. 1960 Orissa 33, the same Judge who sat in Panduram Sahu's case faced with another excommunication case noted that "if a person born in a higher caste is effectively excommunicated, he becomes for all practical purposes, an untouchable and has no place in the society in which he is born." He asked whether it is "constitutional for any group of persons to outcaste a person for transgression of caste rules. He noted that Art. 17 did not define untouchability and that the term was

usually used with reference to those persons who are born in those castes and communities that are classed as Harijans or outcastes. The expression may also be interpreted to include persons who are made untouchables even though they might have been born in a higher caste. In the Hindu Dharma Shastras there was always a sharp distinction between 'Jathi Chandalas' (born untouchables) and 'Karam Chandalas' (those who become Chandalas on account of their own conduct. . . . [He concluded] It is not clear whether Art. 17 is intended to prohibit the outcasting or the excommunication of persons.

Compare the opinions in Saifuddin Saheb's case, below.

Is the right of a panchayat to excommunicate wrongdoers merely permitted in the absence of a legislative prohibition? Or is it a right that is protected by the Constitution against governmental interference? See the case of Saifuddin Saheb v. State of Bombay, below.



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Is this right peculiar to the caste group? Note the cross-cutting sanctions here of caste and village. Could a barber refuse to shave someone because the latter had been expelled by his caste? Could the caste threaten the barbers with loss of trade if they did not help to enforce the caste's decree against him?

Does it matter what Biswambar Sahu was excommunicated for? Suppose he has written a pamphlet critical of caste practice? If such writing would be protected by the Constitution's guarantee of freedom of speech [Art. 19(1)] against governmental restriction, would it still be permissible for the caste to penalize him? Compare Govind Das' case in Part II. Is this still good law? Or has "natural justice" incorporated some new content from the Constitution?

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SANGHAR UMAR RANMAL v. STATE

A.I.R. 1952 Saurashtra 124

Shah C. J. and Baxi J.

July 7, 1952

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Baxi J.: These petitions have been preferred for a declaration that a certain Act of the former Navanagar State called the Pass Hajari Dhara dated 1-12-1911 was void and inconsistent with the provisions of the Articles 15 and 19 of the Constitution.

..... Schedule A [of the Act] . . . contains a list of the communities and individuals to whom the Act applies. Sec. 3 enacts that every male who has completed the age of 16 years shall, in the case of those villages and those persons to whom the Act has been applied or may hereinafter be applied, be governed by it. Sec. 4 requires every male above the age of 16 to attend upon the Police Officer in the village to mark his presence and in the absence of any such Police Officer he is required to attend the Police Patel. The attendance is to be marked in the morning and evening. By Sec. 5 every person to whom the Act applies is required to attend upon Police Officer at any time of the night if called for marking his presence. Sec. 6 prohibits these persons from leaving their villages between 11 p.m. and 5 a.m. except for attending to work in the Sim of the village after obtaining previous permission of the Police Officers specified in the section. They are however prohibited from leaving their village and passing a night in another village without obtaining a permit from the Officer in Charge of the Police Station. By Sec. 10 it is provided that if a person to whom the Act applies leaves his village and settles in any village of the Mahal of the State he shall continue to be governed by the act and shall be required to attend regularly upon the Police Officer. Under Sec. 11 a person of one of the communities mentioned in the Schedule residing in another village becomes subject to the restrictions of the Act on his settling in any of the villages in which the Act has been applied to his community; and finally Sec. 13 empowers the Police Commissioner to direct any person from time to time to sleep at the Police Station if it appears to him that such person is a habitual offender and it is necessary to keep him under restraint. He may be required to sleep at the Police Station so long as he does not improve his character. By Sec. 14 the person to whom the Act applies is required to inform the Police Officer of the arrival of guest over the age of 16 years at his place. Sec. 15 prescribes punishment for contravention of the provisions of the Act and Sec. 16 gives jurisdiction to the Magistrates of the Mahal for trying offenders under the Act.



(3) The learned advocate for the petitioners submitted that the Act discriminated against the persons mentioned in the Schedule on grounds only of race or caste and was therefore inconsistent with Article 15 (1) of the Constitution. He also submitted that its provisions imposed unreasonable restrictions on their fundamental right of freedom of movement and freedom to reside and settle in any part of the territory of India guaranteed by Article 19 (1) (d) and (e) of the Constitution. We agree with these contentions. The Act has been made applicable to certain communities of the villages mentioned in the Schedule. All male members of over 16 of these communities are subjected to the restrictions contained in the Act. The Act therefore discriminates against them on the ground of their caste or community only. The whole Act must therefore be declared as unconstitutional so far as it has been applied to the communities and castes mentioned in the Schedule. . . . The imposition of these restrictions does not depend upon the individual propensity of the persons to whom the Act has been applied. A person may not have committed a single offence and may have been living a pure life and yet legally he must subject himself to the restrictions contained in the Act.

No public interest can be served by subjecting persons to severe restrictions for life whether they are in fact proved to be deserving of them or not. . . . [T]he petitioner Sanghar Ali Umar . . . is not named in the Schedule but belongs to the caste of Sanghar of Nana Ambala to whom the Act has been applied. The Act in his case therefore discriminates against him on the ground only of his caste. It also imposes unreasonable restrictions on his fundamental rights under Article 19(1) (d) and (e) of the Constitution. In his case therefore the Act must be declared unconstitutional on the ground that it contravenes both the Articles 15 and 19 (1) (d) and (e) of the Constitution. . . .

Shar C. J.: I agree

Petitions allowed.

NOTE: Can Government single out specific castes for any purpose at all? Can it penalize specific castes or grant them an exemption of benefit? Where additional police were stationed in a village on ground that villagers were harboring dacoits, receiving stolen property, etc., the Magistrate ordered the costs to be paid by all of the villagers except the Muslims and Harijans (i.e., "untouchables.") The Supreme Court struck down this arrangement as violating Art. 15 (1) since the notification discriminated against the "peaceful and law-abiding persons . . . belonging to the other communities," (State of Rajasthan v. Pratap Singh, A.I.R. 1960 S. C. 1208) on the basis only of caste or religion.



What is caste or religion "only" -- what other differentia have to be added to remove the onus of unconstitutionality? Compare Srinivasa Aiyar v. State of Madras, below.

And what does it mean to "discriminate." Is every differentiation equivalent to discrimination? Can caste or religion be used to delimit electoral constituencies? Art. 325 rules this out for elections at the national and state level, but does not mention local elections. See Main Sukh Das v. State of Uttar Pradesh, A.I.R. 1953 S.C. 384 (communal electorates for Municipal Board election invalid). In Bhopalsingh v. State of Rajasthan, A.I.R. 1958 Raj. 41 a ward boundary for a panchayat election was drawn to exclude "houses of Rajputs in the east of the village." What result?

Does discrimination on the basis of caste include the differences between rules applicable to different varnas in Hindu law. In Sangannagonda v. Kalkangonda, A.I.R. 1960 Mys. 147 the High Court rejected the argument that Articles 14, 15 and 17 make it unconstitutional to apply to Lingayats the "Sudra" rule on adoptions. It said there could be no complaint of deprivation of rights, for Sudras had an enlarged right of adoption compared to the twice born. But then is there not a diminished right to complain of invalid adoptions?

Does the bar against discrimination on grounds of religion invalidate the system of separate bodies of "personal law" for Hindus and Muslims? See the cases of Srinivasa Aiyar and Narasu Appa Mali, below.

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M. R. BALAJI AND OTHERS, Petitioners v.
THE STATE OF MYSORE AND OTHERS, Respondents

1. The Mysore State Chathada Sri Vaishnava
Association. 2. Mysore Arya Vysya Mahasabha
Bangalore, Interveners.

A.I.R. 1963 Supreme Court 649

28th September 1962

B. P. Sinha, C. J., P. B. Gajendragadkar, K.N. Wanchoo, K. C. Das
Gupta and J. C. Shah, JJ.

.....
The following Judgment of the Court was delivered by
GAJANDRAGADKAR, J.:

Since 1958 the State of Mysore has been endeavouring to make a special provision for the advancement of its socially and educationally backward classes of citizens under Article 15(4) of the Constitution, and every time when an order is passed in that behalf, its validity has been challenged by writ proceedings. . . . The present petitions filed by the respective petitioners under Art. 32 dispute the validity of the last order passed by the State of Mysore on July 31, 1962, under Art. 15(4).

(2) Out of the twenty-three petitioners, six had applied for admission to the Pre-professional Class in Medicine in the Medical Colleges affiliated either to the Mysore University or to the Karnatak University, and seventeen had applied for admission to the First Year of the 5-Year integrated course leading to the Degree of B. E. in the University of Mysore. According to the petitioners, but for the reservation made by the impugned order, they would have been entitled to the admission in the respective colleges for which they had applied. As a result of the reservation made by the said order, students who have secured less percentage of marks have been admitted, but not the petitioners. That, in brief, is the petitioners' grievance and they urge that the impugned order which has denied them the facility of admission in the respective colleges is void under Arts. 15(1) and 29(2) and should not be enforced against them. Accordingly, the petitioners pray that a writ of mandamus and/or any suitable writ or direction should be issued against respondent No. 1, the State of Mysore (hereinafter called the state), and the two Selection Committees which have been impleaded as respondents 2 and 3. The petitioners' case is that the impugned order which has been passed under Art. 15(4) is not valid because the basis adopted by the order in specifying and enumerating the socially and educationally backward

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classes of citizens in the State is unintelligible and irrational and the classification made on the said basis is inconsistent with and outside the provisions of Article 15(4). It is also urged by them that the extent of reservation prescribed by the said order is so unreasonable and extravagant that the order, in law, is not justified by Art. 15(4) and, in substance, is a fraud on the power conferred by the said article on the State.

(3) These allegations are denied by the State and it is urged on its behalf that the classification made is both rational and intelligible and the reservation prescribed by the order is fully justified by Art. 15(4). The contention that the order is a colourable exercise of the State's power and amounts to a fraud on the Constitution is disputed.

(4) As we have just indicated, the impugned order was preceded by four other orders and so, it is necessary to refer to the said orders in their sequence to understand the background of the dispute between the parties. On July 26, 1958, the State issued an order that all the communities, excepting the Brahmin community, fell within the definition of educationally and socially Backward Classes and Scheduled Castes and Tribes, and provided for the said communities and tribes reservation of 75% of seats in educational institutions. . . . [W]rit petitions filed to challenge the validity of the order succeeded and the impugned order was quashed.

(5) In 1959 . . . all communities, excepting Brahmins, Baniyas and Kayasts among the Hindus and Muslims, Christians and Jains, were classified as socially and educationally Backward Classes. It appears that 65% of the seats were reserved for these socially and educationally Backward Classes and Scheduled Castes Tribes. These orders were challenged before the Mysore High Court The High Court upheld the pleas raised by the petitioners and quashed the impugned orders. . . .

(6) The State then appointed a Committee called the Mysore Backward Classes Committee with Dr. R. Nagen Gowda as its Chairman, to investigate the problem and advise the Government as to the criteria which should be adopted in determining the educationally and socially Backward Classes, and the special provisions which should be made for their advancement. . . .

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(8) On the 31st July, 1962, the State passed the impugned order which supersedes all previous orders made by the State under Art. 15(4) for reservation of the seats in favour of the Scheduled Castes and Scheduled Tribes as well as the Backward Classes are divided into two categories (1) Backward Classes and (2) More Backward Classes. The effect of this order is that it has fixed 50% as



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the quote for the reservation of seats for Other Backward Classes; 28% out of this is reserved for Backward Classes so-called and 22% for More Backward Classes. The reservation of 15% and 3% for the Scheduled Castes and Scheduled Tribes respectively continues to be the same. The result of this order is that 68% of the seats available for admission to the Engineering and Medical Colleges and to other technical institutions specified in the order passed on the 10th July, 1961, is reserved, and only 32% is available to the merit pool. . . . The petitioners contend that the classification made by this order is irrational and the reservation of 68% made by it is a fraud on Art. 15(4).

(9) The problem raised for our decision by the present petitions involves the consideration of sociological, social and economic factors, and so, before dealing with the contentions raised by the parties before us, it is necessary to set out briefly the material which has been adduced before us. On January 29, 1953, the President appointed the Backward Classes Commission. . . . [There follows a lengthy summary of the Report of the Backward Classes Commission, taking due note of the Chairman's last-minute repudiation of communal basis for distributing benefits.]

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(17) Article 15(4) provides that nothing in this Article or in Cl. (2) of Art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally Backward Classes of citizens or for the Scheduled Castes and the Scheduled Tribes. This Article was added by the Constitution (First amendment) Act, 1951. The object of this amendment was to bring Arts. 15 and 29 in line with Art. 16(1). It will be recalled that in the case of State of Madras v. Smt. Champakam Dorairajan 1951 SCR 525: (AIR 1951 SC 226) the validity of the Government order issued by the Madras Government fixing certain proportions in which students seeking for admissions to the Engineering and Medical Colleges in the State should be admitted, was challenged. The said Government Order was on the face of it a communal order fixing the admissions in the stated proportion by reference to the communities of the candidates. . . . It was directly as a result of this decision that Art. 15 was amended and Art. 15(4) was added. Thus, there is no doubt that Art. 15 (4) has to be read as a proviso or an exception to Arts. 15(1) and 29(2). In other words, if the impugned order is justified by the provisions of Art. 15(4), its validity cannot be impeached on the ground that it violates Art. 15(1) or Art. 29(2). The fundamental rights guaranteed by the said two provisions do not affect the validity of the special provision which it is permissible to make under Art. 15(4). This position is not and cannot be in dispute. The petitioners contend that the impugned order is invalid because it is not justified by Art. 15(4).

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(21) In considering the scope and extent of the expression "backward classes" under Art. 15(4), it is necessary to remember that the concept of backwardness is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included in it. If such relative tests were to be applied by reason of the most advanced classes, there would be several layers or strata of backward classes and each one of them may claim to be included under Art. 15(4). This position is not disputed before us by the learned Advocate-General for the State. The backwardness under Art. 15(4) must be social and educational. It is not either social or educational, but it is both social and educational; and that takes us to the question as to how social and educational backwardness has to be determined.

(22) Let us take the question of social backwardness first. By what test should it be decided whether a particular class is socially backward or not? The group of citizens to whom Art. 15(4) applies are described as 'classes of citizens,' not as castes of citizens. A class, according to the dictionary meaning, shows division of society according to status, rank or caste. In the Hindu social structure, caste unfortunately plays an important part in determining the status of the citizen. Though according to sociologists and vedic scholars, the caste system may have originally begun on occupational or functional basis, in course of time, it became rigid and inflexible. The history of the growth of caste system shows that its original functional and occupational basis was later over-burdened with considerations of purity based on ritual concepts, and that led to its ramifications which introduced inflexibility and rigidity. This artificial growth inevitably tended to create a feeling of superiority and inferiority, and to foster narrow caste loyalties. Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection it is, however, necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves.

(23) Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats



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are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Art. 15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.

(24) The occupations of citizens may also contribute to make classes of citizens socially backward. There are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward. The place of habitation also plays not a minor part in determining the backwardness of a community of persons. In a sense, the problem of social backwardness is the problem of Rural India and in that behalf, classes of citizens occupying a socially backward position in rural area fall within the purview of Art. 15(4). The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem; and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way. That is the function of the State which purports to act under Art. 15(4). All that this Court is called upon to do in dealing with the present petitions is to decide whether the tests applied by the impugned order are valid under Art. 15(4). If it appears that the test applied by the order in that behalf is improper and invalid, then the classification of socially backward classes based on that test will have to be held to be inconsistent with the requirements of Art. 15(4).

(25) What then is the test applied by the State in passing the impugned order? We have already seen that the Nagan Gowda Committee appointed by the State was inclined to treat the caste as almost the sole basis in determining the question about the social backwardness of any community. The committee has no

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doubt incidentally referred to the general economic condition of the community as a contributory factor; but the manner in which it has enumerated the backward and more backward classes leaves no room for doubt that the predominant if not the sole, test that weighed in their minds was the test of caste. When we consider the impugned order itself, the position becomes absolutely clear. . . . [W]e are satisfied that the classification of the socially backward classes of citizens made by the State proceeds on the consideration only of their castes without regard to the other factors which are undoubtedly relevant. If that be so, the social backwardness of the communities to whom the impugned order applies has been determined in a manner which is not permissible under Art. 15(4) and that itself would introduce an infirmity which is fatal to the validity of the said classification.

(26) The next question to consider is in regard to the educational backwardness of the classes of citizens. The Nagan Gowda Report and the impugned order proceed to deal with this question on the basis of the average of student population in the last three High School classes of all High Schools in the State in relation to a thousand citizens of that community. On the figures supplied to the Committee which admittedly are approximate and not fully accurate, the Committee came to the conclusion that the State average of student population in the last three High School classes of all High Schools in the State was 6.9 per thousand. The Committee decided that all castes whose average was less than the State average of 6.9 per thousand should be regarded as backward communities, and it further held that if the average of any community was less than 50% of the State average, it should be regarded as constituting the more backward classes. It may be conceded that in determining the educational backwardness of a class of citizens, the literacy test supplied by the Census Reports may not be adequate; but it is doubtful if the test of the average of student population in the last three High School classes is appropriate in determining the educational backwardness. Having regard to the fact that the test is intended to determine who are educationally backward classes, it may not be necessary or proper to put the test as high as has been done by the Committee. But even assuming that the test applied is rational and permissible under Art. 15(4), the question still remains as to whether it would be legitimate to treat castes or communities which are just below the State average as educationally backward classes. If the State average is 6.9 per thousand, a community which satisfied the said test or is just below the said test cannot be regarded as backward. It is only communities which are well below the State average that can properly be regarded as educationally backward classes of citizens. Classes of citizens whose average of student population works below 50% of the State average are obviously educationally backward



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classes of citizens. Therefore, in our opinion, the State was not justified in including in the list of Backward Classes, castes or communities whose average of student population per thousand was slightly above, or very near, or just below the State average.

(27) It will be recalled that the Nagan Gowda Committee had recommended that the Lingayats should not be treated as Backward Classes. The State has decided otherwise, and in doing so, the State has taken the view that the figures arrived at by the Committee should be corrected to the nearest integer as, in the nature of things, says the order of July, 1960, it is not possible to attain absolute mathematical precision in making such assessments. That is how the State average was raised from 6.9 to 7 per thousand. Even after increasing the State average to 7 the position with regard to Lingayat community was that its average of students population was 7.1 per thousand according to the Committee's conclusions and according to the decision of the State 7, and yet the Lingayats as a community have been held to be an educationally backward class of citizens under the State order. This result has been achieved by adding .1 to the State average and deducting .1 from the Lingayat's average. The Ganigas whose average of student population is 7 per thousand are likewise included in the list of Backward Classes. If the State average is 6.9 or 7, it would, we think, be manifestly erroneous to regard those communities as educationally backward whose student population ratio works at the same level as the State average.

(28) In regard to the Muslims, the majority view in the Committee was that the Muslim community as a whole should be treated as socially backward. This conclusion is stated merely as a conclusion and no date or reasons are cited in support of it. The average of student population in respect of this community works at 5 per thousand and that, in our opinion, is not so below the State average that the community could be treated as educationally backward in the State of Mysore. Therefore, we are not satisfied that the state was justified in making the view that communities or castes whose average of student population was the same as, or just below, the State average, should be treated as educationally backward classes of citizens. If the test has to be applied by a reference to the State average of student population, the legitimate view to take would be that the classes of citizens whose average is well or substantially below the State average can be treated as educationally backward. On this point again, we do not propose to lay down any hard and fast rule; it is for the State to consider the matter and decide it in a manner which is consistent with the requirements of Art. 15(4).

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(29) In this connection, it is necessary to add that the sub-classification made by the order between Backward Classes and More Backward Classes does not appear to be justified under Article 15(4). Article 15(4) authorises special provision being made for the really backward classes. In introducing two categories of Backward Classes what the impugned order, in substance purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced compared to the most advanced classes in the State, and that, in our opinion, is not the scope of Art. 15 (4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of Backward and More Backward. The classification of the two categories, therefore, is not warranted by Art. 15(4).

(30) That takes us to the question about the extent of the special provision which it would be competent to the State to make under Art. 15(4). Article 15(4) authorises the State to make any special provision for the advancement of the Backward Classes of citizens or for the Scheduled Castes and Scheduled Tribes. The learned Advocate-General contends that this Article must be read in the light of Art. 56, and he argues that Art. 15(4) has deliberately and wisely placed no limitation on the State in respect of the extent of special provision that it should make. Art. 56 which contains a directive principle, provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. There can be no doubt that the object of making a special provision for the advancement of the castes or communities, there specified, is to carry out the directive principle enshrined in Art. 46. It is obvious that unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality will not be attained, and so, there can be no doubt that Art. 15(4) authorises the State to take adequate steps to achieve the object which it has in view. No one can dispute the proposition that political freedom and even fundamental rights can have very little meaning or significance for the Backward Classes and the Scheduled Castes and Scheduled Tribes unless the backwardness and inequality from which they suffer are immediately redressed. The learned Advocate-General, however, suggests



that the absence of any limitation on the State's power to make an adequate special provision indicates that if the problem of backward classes of citizens and Scheduled Castes and Tribes in any given State is of such a magnitude that it requires the reservation of all seats in higher educational institutions, it would be open to the State to take that course. His argument is that the only test which can be applied is whether or not having regard to the problem which the State is called upon to meet, the provision made is reasonably adequate or not. Thus presented, the argument is, no doubt, *prima facie* attractive, and so, it must be carefully examined.

(31) When Art. 15(4) refers to the special provision for the advancement of certain classes or scheduled castes or scheduled tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interest of the society at large would be served by promoting the advancement of the weaker elements in the society that Art. 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4). It would be extremely unreasonable to assume that in enacting Art. 15(4) the Constitution intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored.

(32) In this connection, it is necessary to remember that the reservation made by the impugned order is in regard to admission in the seats of higher education in the State. It is well-known that as a result of the awakening caused by political freedom, all classes of citizens are showing a growing desire to give their children higher university education and so, the Universities are called upon to face the challenge of this growing demand. While it is necessary that the demand for higher education which is thus increasing from year to year must be adequately met and properly channelised, we cannot overlook the fact that in meeting that demand standards of higher education in Universities must not be lowered. The large demand for education may be met by starting larger number of educational institutions, vocational schools and polytechnics. But, it would be against the national interest to exclude from the portals of our Universities qualified and competent students on the ground that all the



seats in the Universities are reserved for weaker elements in society. As has been observed by the University Education Commission,

he indeed must be blind who does not see that mighty as are the political changes, far deeper are the fundamental questions which will be decided by what happen in the Universities.(P.32).

Therefore, in considering the question about the propriety of the reservation made by the impugned order, we cannot lose sight of the fact that the reservation is made in respect of higher university education. The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by wholesale reservation of seats in all technical, Medical or Engineering colleges or institutions of that kind. Therefore, considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Art. 15(4) can be special provision which excludes the rest of the society altogether. In this connection, it would be relevant to mention that the University Education Commission which considered the problem of the assistance to backward communities, has observed that the percentage of reservation shall not exceed a third of the total number of seats, and it has added that the principle of reservation may be adopted for a period of ten years. (P. 53).

(33) We have already noticed that the Central Government in its communication to the State has suggested that reservation for backward classes, Scheduled Castes and Scheduled Tribes may be up to 25% with marginal adjustments not exceeding 10% in exceptional cases.

(34) The learned Advocate-General has suggested that reservation of a large number of seats for the weaker sections of the society would not affect either the depth or efficiency of scholarship at all, and in support of this argument, he has relied on the observations made by the Backward Classes Commission that it found no complaint in the States of Madras, Andhra, Travancore-Cochin and Mysore where the system of recruiting candidates from other Backward Classes to the reserve quota has been in vogue for several decades. The Committee further observed that the representatives of the upper classes did not complain about any lack of efficiency in the offices recruited by reservation (P. 135). This opinion, however, is plainly inconsistent with what is bound to be the inevitable consequence of reservation in higher university education. If admission to professional and technical colleges is unduly liberalised, it would be idle to contend that the quality of our graduates will not suffer.



That is not to say that reservation should not be adopted; reservation should and must be adopted to advance the prospects of the weaker sections of society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities. A special provision contemplated by Art. 15(4) like reservation of posts and appointments contemplated by Art. 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case. In this particular case it is remarkable that when the State issued its order on July 10, 1961, it emphatically expressed its opinion that the reservation of 68% recommended by the Nagan Gowda Committee would not be in the larger interests of the State. What happened between July 10, 1961, and July 31, 1962, does not appear on the record. But the State changed its mind and adopted the recommendation of the Committee ignoring its earlier decision that the said recommendation was contrary to the larger interests of the State. In our opinion, when the State makes a special provision for the advancement of the weaker sections of society specified in Article 15(4) it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations. Therefore, we are satisfied that the reservation of 68% directed by the impugned order is plainly inconsistent with Art. 15(4).

(35) The petitioners contend that having regard to the infirmities in the impugned order, action of the State in issuing the said order, amounts to a fraud on the Constitutional power conferred on the State by Art. 15(4). This argument is well-founded, and must be upheld. When it is said about an executive action that it is a fraud on the Constitution, it does not necessarily mean that the action is actuated by mala fides. An executive action which is



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patently and plainly outside the limits of the constitutional authority conferred on the State in that behalf is struck down as being ultra vires the State's authority. If, on the other hand, the executive action does not patently or overtly transgress the authority conferred on it by the Constitution, but the transgression is covert or latent, the said action is struck down as being a fraud on the relevant constitutional power. It is in this connection that courts often consider the substance of the matter and not its form and in ascertaining the substance of the matter, the appearance or the cloak, or the veil of the executive action is carefully scrutinized and if it appears that notwithstanding the appearance, the cloak or the veil of the executive action, in substance and in truth the constitutional power has been transgressed, the impugned action is struck down as a fraud on the Constitution. We have already noticed that the impugned order in the present case has categorised the Backward Classes on the sole basis of caste which, in our opinion, is not permitted by Art. 15(4); and we have also held that the reservation of 68% made by the impugned order is plainly inconsistent with the concept of the special provision authorised by Art. 15(4). Therefore, it follows that the impugned order is a fraud on the Constitutional power conferred on the State by Art. 15(4).

. . . It appears that the Maharashtra Government has decided to afford financial assistance, and make monetary grants to students seeking higher education where it is shown that the annual income of their families is below a prescribed minimum. The said scheme is not before us and we are not called upon to express any opinion on it. However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty. An attempt can also be made to start newer and more educational institutions, polytechnics, vocational institutions and even rural Universities and thereby create more opportunities for higher education. This dual attack on the problem posed by the weakness of backward communities can claim to proceed on a rational, broad and scientific approach which is consistent with, and true to, the noble ideal of a secular welfare democratic State set up by the Constitution of this country. Such an approach can be supplemented, if necessary by providing special provision by way of reservation to aid the Backward classes and Scheduled castes and Tribes. It may well be that there may be other ways and means of achieving the same result. In our country where social and economic conditions differ from state to state, it would be idle to expect absolute uniformity of approach; but in taking executive action to implement the policy of Art. 15(4), it is necessary for the States to remember that the policy which is intended to be implemented

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is the policy which has been declared by Art. 46 and the preamble of the Constitution. It is for the attainment of social and economic justice that Art. 15(4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under Art. 15 or 29(2). The context, therefore, requires that the executive action taken by the State must be based on an objective approach free from all extraneous pressures. The said action is intended to do social and economic justice and must be taken in a manner that justice is and should be done.

.....
(38) In the result, we allow the writ petitions and direct that an appropriate writ or order or direction should be issued restraining the three respondents from giving effect to the impugned order. . . .

Petitions allowed.

NOTE: Has the Court ruled out caste considerations entirely? Can we distinguish between (1) the use of castes as the units or classes which are backward and (2) caste in the sense of caste rank as a test of the backwardness of the group? Is not the Court willing to allow "communities" to be the units or classes which may (or may not) be found backward by the state if it uses suitable criteria of backwardness. What role if any may the rank or standing of a caste play in determining whether it is "socially backward."

The Mysore Government tried once more in 1963 and were promptly taken to court. (The judge observed that "the college admission Writs have become an annual feature in this Court. . . .") This time the backward classes were designated on the basis of income and occupation of the applicant's family. The Mysore High Court upheld the classification but noted that it was clear from the Balaji case that "caste" was a relevant factor in determining the social backwardness of Hindus and ought to have been used along with these other criteria. Since the latter were not unreasonable, the Order was upheld, the court expressing the hope that the government would make "a more appropriate classification lest its bona fides should be questioned." D. G. Visawanath v. Government of Mysore, A.I.R. 1964 Mys. 132, 140.

On appeal, the Supreme Court affirmed and went out of its way to repudiate the High Court's reading of the Balaji case. "We would hasten to make clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the [Balaji] judgment of this Court which precludes that authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances. . . ." R. Chitralakha v. State of Mysore, 43 Mys. L.J. (S.C.C.) 11, 20 (1964). This time Mysore government reserved only 48% of the seats.

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Why does the Court in Balaji say that backward classes must be both educationally and socially backward? Can there be only a single list of backward classes in each state or can there be different lists for different purposes? If backward classes are selected by non-communal tests of income, occupation, etc., how could it be determined that the recipients are both educationally and socially backward?

May the state apportion the reserved places among backward classes according to their population? According to their respective backwardness?

What effect might this system of "protective" or "compensatory" discrimination have upon Indian politics? Upon the relations between castes and communal groups? Upon Indian education? Upon the way in which castes visualize themselves?

To what extent is this system of preferences compatible with the general Constitutional policies of equality and non-discrimination. How might the preferences be arranged to leave the principle of equality and merit competition unimpaired--or impaired as little as possible?

* * * * *

So long as membership in a group is a pre-condition for preferment of various kinds, the Courts have to pass on the question of whether a person is in fact a member of the preferred group. (Similar questions have arisen and do arise concerning membership in groups for purposes of selecting the applicable rule of personal law.) Is membership in a caste or tribe to be determined solely by birth, or by allegiance or by the opinion of its members or of the general neighborhood? Does one lose caste by conversion? By assimilation? By excommunication? In the following case, the Court is dealing with a candidate for one of the seats in Parliament reserved for members of the Scheduled Castes. Note that the problem here is a very different one from that in the Balaji case. There we were dealing with the legitimacy of the state's designation of certain castes as "backward classes." Here we are dealing with the Scheduled Castes (the official euphemism for 'untouchables'). The Constitution specified procedures for designation of Scheduled Castes and Tribes by central authority. Arts. 341, 342. The question here is whether the candidate is actually a member of one of the specified castes.



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CHATTURBHUJ VITHALDAS JASANI v.
MORESHWAR PARASHRAM AND OTHERS

1954 Supreme Court Reports 817

.....
[Bose, J.]— We now turn to Gangaram Thaware. He stood as a Scheduled Caste candidate and his nomination was rejected [by the returning officer] on the ground that he did not belong to the Scheduled Caste in question, namely the Mahars.

The only question here is whether he ceased to be a Mahar when he joined the Mahanubhava Panth. This gave rise to much controversy and we have been presented with many conflicting opinions. Thus, the Imperial Gazetteer of India, Volume XXI, page 301, states that the founder of the sect repudiated the caste system as also a multiplicity of Gods and insisted on the monotheistic principle. At the same time it says that he taught his disciples to eat with none but the initiated and to break off all former ties of caste and religion. Russell in Volume IV of his Tribes and Castes of the Central Provinces says that the Manbhaoas (Mahanubhau) is a religious sect or order which has "now" (1911) become a caste. The Central Provinces Ethnographic Survey, Volume IX, says the same thing at page 107 and at page 110 and adds that members of the sect often act as priests or gurus to the Mahars.

As against this, the Election Tribunal has quoted a number of opinions which tend the other way. Thus, V. B. Kolte says at page 247 of his Shri Chandradhar Charitra that no serious attempt has been made by them to abolish caste, and Ketkar says at page 76, Volume XVIII of the 1926 edition of his Maharashtriya Dhnyankosh that there are two divisions among the Mahanubhavas, one of Sanyasis who renounce the world and the other a secular one. The latter observe the caste system and follow the rituals of their own caste and carry on social contacts with their caste people and marry among them. Similar views are expressed by Bal Krishna Mahanubhav Shastri. But we are not really concerned with their theology. What we have to determine are the social and political consequences of such conversions and that, we feel, must be decided in a common sense practical way rather than on theoretical and theocratic grounds.

Conversion brings many complexities in its train, for it imports a complex composite composed of many ingredients. Religious beliefs, spiritual experience and emotion and intellectual conviction mingle with more material considerations such as severance of family and social ties and the casting off or retention of

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old customs and observances. The exact proportions of the mixture vary from person to person. At one extreme there is bigoted fanaticism bitterly hostile towards the old order and at the other an easy going laxness and tolerance which makes the conversion only nominal. There is no clear cut dividing line and it is not a matter which can be viewed from only one angle.

Looked at from the secular point of view, there are three factors which have to be considered: (1) the reactions of the old body, (2) the intentions of the individual himself and (3) the rules of the new order. If the old order is tolerant of the new faith and sees no reason to outcaste or ex-communicate the convert and the individual himself desires and intends to retain his old social and political ties, the conversion is only nominal for all practical purposes and when we have to consider the legal and political rights of the old body the views of the new faith hardly matter. The new body is free to estracise and outcaste the convert from its fold if he does not adhere to its tenets, but it can hardly claim the right to interfere in matters which concern the political rights of the old body when neither the old body nor the convert is seeking either legal or political favours from the new as opposed to purely spiritual advantage. On the other hand, if the convert has shown by his conduct and dealings that his break from the old order is so complete and final that he no longer regards himself as a member of the old body and there is no reconversion and readmittance to the old fold, it would be wrong to hold that he can nevertheless claim temporal privileges and political advantages which are special to the old order.

In our opinion, broadly speaking, the principles laid down by the Privy Council in the case of a Hindu convert to Christianity apply here: not, of course, the details of the decision but the broad underlying principle.

In Abraham v. Abraham (9 M.I.A. 199 at 242, 243, and 244), their Lordships say:--

"He" (the convert) "may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion."

The only modification here is that it is not only his choice which must be taken into account but also the views of the body whose religious tenets he has renounced, because here the right we are considering is the right of the old body, the right conferred on it as a special privilege to send a member of its own fold to Parliament. But with that modification the observations which follow apply in their broad outline.



"The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed."

Now what are the facts here? Whatever the views of the founder of this sect may have been about caste, it is evident that there has been no rigid adherence to them among his followers in later years. They have either changed their views or have not been able to keep a tight enough control over converts who join them and yet choose to retain their old caste customs and ties. We need not determine whether the Mahanubhava tenets encourage a repudiation of caste only as a desirable ideal or make it a fundamental of the faith because it is evident that present-day Mahanubhavas admit to their fold persons who elect to retain their old caste customs. That makes it easy for the old caste to regard the converts as one of themselves despite the conversion which for all practical purposes is only ideological and involves no change of status.

Now no witness has spoken of any outcasting, neither outcasting in general nor in this special case. No single instance has been produced in which any person who has joined this sect from the Mahar community has ever been outcasted from the Mahars for that reason; and as the sect is said to be over 1000 years old, there has been time enough for such instances to accumulate. Further, no instance has been produced of a Mahanubhava marrying outside his or her old caste whereas there are instances of Mahanubhavas who have married non-Mahanubhavas belonging to their own caste. Nene (P. W. 1), Sadasheo (P. W. 3), Sitaram (P. W. 4) and Haridas (P. W. 5) say that a Mahar convert does not lose his caste on conversion. He is admitted to all caste functions and can marry in the community. Of these, Sadasheo (P. W. 3) and Haridas (P. W. 5) are Mahars.

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by saying that Mahanubhavas who do these things are not real Mahanubhavas. Harenda (R. W. 1) is a Mahanubhava Guru and so ought to know, but he affects an otherworldly indifference to mundane affairs and says that as he does not lead a worldly life he does not know whether converts retain their caste distinctions and whether there are inter-dinings and inter-marriages in the Mahanubhava fold itself among those who belonged to different castes before conversion.

Shankar (R. W. 2) says that a convert loses his caste on conversion but gives no instance of Ostracism from the old fold. In any case, his evidence is confined to the sanyasi order among the Mahanubhavas because he says that every person who becomes a convert to this sect must renounce the world and cannot marry. When pinned down in cross-examination he had to admit that he did know two or three Mahanubhavas who were leading a worldly life but he meets that by saying that they are not real Mahanubhavas. Chudaman (R. W. 3) evades the issue in the same way. He is a Mahanubhava Pujari and so is another person who ought to have special knowledge. Despite that he says he cannot give a single instance of a person belonging to one caste, initiated into the Mahanubhava sect, marrying a person of another caste initiated into the same Panth. When further pressed he said the question did not arise as a man lost his caste on conversion.

On this evidence, and after considering the historical material placed before us, we conclude that conversion to this sect imports little beyond an intellectual acceptance of certain ideological tenets and does not alter the convert's caste status, at any rate, so far as the householder section of the Panth is concerned.

So much for the caste consciousness on both sides. Now considering Gangaram Thaware the individual we find that he was twice married and on both occasions to Mahar girls who were not Mahanubhavas at the time of their respective marriages. His first wife was never converted. His second wife was converted after her marriage. The witnesses say he was still regarded as a Mahar after his conversion and always looked upon himself as a Mahar and identified himself with the caste. No one on the other side denies this. As we have shown, they took shelter behind generalities and evaded the issue by saying that in that case he cannot be a real Mahanubhava. If he was not, then he must have continued a Mahar even on their view.

The evidence also discloses that Gangaram Thaware led Mahar agitations and processions as a member and leader of the Mahar caste. In 1936 he contested the election for the Provincial Assembly as a Mahar candidate. No one appears

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to have questioned his competency. And lastly, he declared himself to be a Mahar in the verification to his nomination form in the present election as also in an affidavit filed before the Returning Officer who rejected his nomination. The Returning Officer described that as a "cleverly worded document." We have read it and find nothing tricky or crooked in it. Therefore, applying the test in Abraham v. Abraham (9 M.I.A. 199.), we hold that despite his conversion he continued to be a Mahar and so his nomination form was wrongly rejected. That affects the whole election.

The other points argued before the Election Tribunal were not pressed before us. We therefore uphold the decision of the Tribunal and dismiss the appeal with costs.

Appeal dismissed

NOTE: Would a person remain a member of his caste if he joined the Arya Samaj? See Shyamsundar v. Shakar Deo, A.I.R. 1960 Mys. 27. Suppose he became a Christian or a Muslim or a neo-Buddhist? See Michael v. Venkateswaran, A.I.R. 1952 Mad. 474, where the Court held that "a convert ceases to have any caste." Suppose he becomes a neo-Buddhist?

The Order specifying Scheduled Castes stipulates that no person professing a religion other than the Hindu or Sikh religion shall be deemed a member of a Scheduled Caste. Is this not religious discrimination forbidden by Art. 15? See Gurmukh Singh v. Union of India, A.I.R. 1952 Punj. 143.

Who is a Hindu? In Chandrasekhara Mudaliar v. Kulandaivelu Mundaliar, the Supreme Court had to decide on the validity of a consent to adoption by a sapinda, a DMK member who staunchly disavowed belief in the religious efficacy of adoption, in Hindu rituals and scriptures, in "atma" and salvation. The Court found that "the fact that he does not believe in such things does not make him any the less a Hindu He was born a Hindu and continues to be one until he takes to another religion. . . ." A.I.R. 1963 S.C. 185, 200. Can one cease to be a Hindu by anything short of a formal act of conversion? How about an ardent supporter and organizer of the neo-Buddhist movement? See Karwadi v. Shambharkar, A.I.R. 1958 Bom. 296.

There is no corresponding religious test for membership in Scheduled Tribes. A tribal may be a Christian, a Buddhist and, of course, a Hindu. But suppose he claims that he is a Kshatriya? Will this remove him from the tribe and make him ineligible to state for a reserved seat in the legislature? Following the tests laid out in the Chatturbhuj Vithaldas Jasani case, how should we go about answering such a question? Compare the procedure followed by the Supreme Court in Giri v. Sura Dora, A.I.R. 1959 S.C. 1318 where it was declared "the caste status of a person . . . would necessarily have to be determined in the light of the recognition received by him from the members of the caste in which he seeks an entry." Going back to the case of Mr. Thaware, should we have looked at the attitude of the Panth rather than that of the Mahars? In view of the purpose of the provision for reserved seats, which group's views ought to count?

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Ought the opinion of the group count equally where the preference is not a political safeguard which devolves on the group as a whole (e.g., a reserved seat) but instead is a welfare measure which is given to individuals, but these individuals are in turn selected by their membership in certain groups. (e.g., eligibility for a housing loan). Should the opinion of the group outweigh the intention of the individual in instances of excommunication?

Can membership in a caste or tribe be merely a matter of individual volition? Compare the Sura Dora case, above, with Sankara Namboodri v. Madhavan, A.I.R. 1955 Mad. 479, where a Brahmin family attempted to become Namboodiri Brahmins.

Do the new forms of mobility provided by reserved seats and other preferences supplement the older forms? Or is it necessary to forsake the older forms in order to benefit from the new?

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B. Religion in the Secular State

GOTIMAYUM BIRAHARI SARMA, Appellant v.
THINGNAM IBOMCHA SINGH AND ANOTHER, Respondents

A.I.R. 1960 Manipur 34
T. N. R. Tirumalpad, J. C.

JUDGMENT:

(2) The appellant filed the two suits for a declaration that he was the priest of the village and that he was entitled to officiate as priest on the occasion of the Sradh ceremonies among the villagers of the said village. . . .

The appellant's case was that this Iboyaima Sarma officiated as priest on the two occasions of the Sradh ceremonies consequent on the deaths of the daughter of Ibomcha Singh and of the daughter of Hema Singh and realised Rs. 10/- as fees and Rs. 15/- as price of offerings in each instance. His further case was that Sir Chandrakirti Singh, the late Maharaja of Manipur had installed an image of Shri Crishnachandraji at Kakching Khullen for the benefit of the three villages--Kakching Khullen, Kakching Wairi and Kakching Khunou and appointed appellant's grandfather, Tolen Sarma as the Shebait of the said deity and further ordered that the Shebait of the said deity should be priest of these three villages. Accordingly, his grand-father worked as the priest of the three villages and after his death his father worked as such and after his death the appellant has been working as the priest.

In December, 1952, the daughter of Ibomcha Singh, resident of Kakching Khunou village died and Iboyaima Sarma, without the knowledge and consent of the appellant worked as priest on the occasion of her Sradh ceremony and received the fees and offerings. Similarly, in July, 1954, the daughter of Hema Singh of Kakching Khunou died and Iboyaima Sarma again officiated as priest for the Sradh and received the offerings and fees. The appellant claimed that in both cases he being the hereditary priest for the families of Ibomcha Singh and Hema Singh, was entitled to officiate as priest and receive the offerings and fees. He therefore asked for a declaration in the two cases that he is the priest in the village and wanted to recover the fees and offerings in the two respective cases.

(12) Thus there can be no doubt that this particular grant to the appellant's fore-fathers was not merely a conferment of certain rights to the appellant and his fore-fathers but amounted to an order to his subjects in the three villages forcing them to a particular course of conduct. Such an order has certainly the

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force of law within the meaning of Art. 13(3)(a) of the Constitution. Though the subjects of the Maharajah were forced to accept that order, the validity of the said order after the said subjects became citizens of India would depend on the question whether it infringed the fundamental rights guaranteed to the citizens under Part III of the Constitution.

.....

(13) The question now is whether this law offends any one of the fundamental rights. Article 25 of the Constitution guaranteed to a citizen the freedom to practice his religion. Religious ceremonies which have to be performed by a citizen are part of the practice of his religion. For the performance of such religious ceremonies, a Hindu has to get the aid of a priest. If any law says to a Hindu that he shall call only a particular priest to officiate in his religious ceremonies, it is certainly an interference in the freedom to practise his religion. There is no doubt therefore that this particular law which says that the villagers of the three Kakching villages shall call only the Shebait of Sri Krishnachandraji to officiate in their religious ceremonies, is such an interference and such a law is certainly void under Art. 13.

NOTE: Would it make any difference if the priest's monopoly was "customary" rather than decreed by a Maharaja?

Does the priest stand on a different footing than other occupants of traditional village offices--e.g., the blacksmith, the sweeper, the patel? See the cases of Dasaratha Rama Rao and Sattenma, below.

Suppose it was the villagers who were suing the priest to require him to officiate at a ceremony. Would their claim also fall? On the same grounds?

What effect might such a decision as the one here have on the organization of the village? On the nature of Hinduism?

* * * * *



1965 -Galanter-Legal Material -Devchand Totaram Case (886)

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SANJIB KUMAR CHOWDHURY, Petitioner v.
PRINCIPAL, ST. PAUL'S COLLEGE AND OTHERS, Opposite Parties

(S) A.I.R. 1957 Calcutta 524

Sinha, J. (27-5-1957)

Civil Revn. No. 3009 of 1956

.....
ORDER:-- The facts in this case are shortly as follows:--There is a well-known College in Calcutta, known as St. Paul's College, the proper designation being St. Paul's Cathedral Mission College. It is a College which was originally founded in 1865 by the Church Missionary Society, as the Cathedral Mission College at 22, Mirzapore Street. It was reformed in 1899 under the name and style of the Church Missionary Society's College and moved to its present site in Amherst Street in 1908. The present name was adopted in 1914. As stated above, the College was founded by the Church Missionary Society, also known as the Church Missionary Society of Africa and the East. The Society has properties in Africa and the East and so far as Calcutta is concerned, it holds properties through the Church Missionary Trust Association Limited. The Society has permitted the governing body of St. Paul's College to use the land and buildings situate in Calcutta, for the purposes of the said College. The constitution of the College provides that the Church Missionary Society had given free occupancy of the land and buildings to the College governing body on the understanding that they will be used for carrying on the College on the lines which the Society had laid down. The lands and buildings of the College are very valuable and are worth several lacs of rupees. For several years, and even at present, the College receives recurring grants from the Government. It is also admitted that although it is a Christian College over 90 per cent of the students are Hindus. As I have stated above, the present governing body has been allowed to use the premises for the purposes of running the institution in accordance with the principles and policy laid down by the Church Missionary Society, and it is in conformity with these principles and policy that it has been set down in the prospectus issued by the College as follows:--

Religions Life and Teaching.

There are services in the College Chapel at 8:30 a.m. daily except Sundays. On alternate Sundays there is an administration of Holy Communion at 7 a.m. Bengali Services are held in Holy Trinity Church, Amherst Street, and students are free to attend the Churches in the city.

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Non-Christian students are welcome at the Services in the College Chapel.

All College students are expected to receive religious teaching twice a week during College hours. Members of the staff are glad to arrange times for private instruction with any student who may so desire.

Full liberty of conscience in the matter of personal devotions is given to all students; BUT NO ACTS OF CORPORATE WORSHIP WHICH ARE CONTRARY TO CHRISTIAN PRINCIPLES ARE ALLOWED IN THE COLLEGE.

(2) It appears that inside the College compound there is a Christian Chapel, but attendance at the Chapel is not compulsory. It is stated however that non-Christian students are welcome at the Services held in the College Chapel. The prospectus, inter alia, lays down that admission into the College in all cases implied an undertaking by the student and his parents or guardians, to submit willingly to the rules and discipline of the College. Prior to admission to the College, a student is required to make an application in the prescribed form. The petitioner made an application in the prescribed form and entered the College on the 27th June 1955, in the 1st year I. Sc. class. In his application he willingly undertook to submit to the rules and discipline of the College. On the 1st February 1956, 181 students of the College, and on the 10th February 1956, 85 students of the College placed two several memoranda before the Principal of the said College asking for permission to celebrate 'Saraswati Puja' inside the College compound. If this prayer was granted, it would necessarily involve the installation of the idol of the Goddess Saraswati within the College compound, where it is said, there is an available open space which is suitable for that purpose. The Principal of the College has refused to grant permission. Apart from these two memoranda, there have been other applications made from time to time, but the authorities have consistently turned them down, on the ground that in accordance with the rules of the College as notified by the College prospectus and accepted by the students, and in conformity with the constitution and aims of the College as laid down by its founders, it was not possible to grant the prayer. It is further stated that while full liberty of conscience for personal devotion is given to all students, any worship or ceremony within the College and its hostels contrary to Christian principles cannot be permitted under the College constitution, as not being in conformity with the aims of its founders. This application has been made questioning the legal validity of such refusal.

(3) Mr. Chatterjee appearing on behalf of the petitioner frames his case thus. He principally relies on Art. 25 of the Constitution, which lays down that subject to public order, morality and health, and to the other provisions of



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Part III of the Constitution, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. He next relies on Art. 29 (2) of the Constitution which lays down that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them. The respondents on the other hand, rely on Art. 30 of the Constitution which lays down that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(4) So far as Art. 29 (2) is concerned, it is clear that there is no application thereof to the facts of this case at all. It is admitted that the College receives aid out of State funds, but there is no question of any denial of admission to the institution which is admittedly receiving aid out of State funds. On the other hand, as I have stated above, more than 90 per cent. students are non-Christians, and belong to the Hindu community. Mr. Chatterjee argues that if as a result of Art. 29 (2) there was a legal right in members of the Hindu community to get admission into the College, then they have every right under Art. 25 to freely profess, practise and propagate their religion within the precincts of the College receiving such aid including the performance of Saraswati Puja. In my opinion, this is a misreading of Art. 25 of the Constitution. That Article grants to a citizen the right to freedom of conscience and the right freely to profess, practise and propagate religion, but that does not mean that he could carry out the practices of his religion anywhere he chooses, even on the private property of others, in spite of the objection of the owner. Speaking of the 1st amendment to the American Constitution which prohibits interference by law in the free exercise of religion, Justice Douglas said as follows in a Judgment of the Supreme Court of America, U.S. v. Ballard, (1944) 322 US 78 (86): 88 Law Ed 1148 (A):

The first amendment has a dual aspect. It not only forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship, but also safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts--freedom to believe and freedom to act. The first is absolute but in the nature of things the second cannot be.

(5) The Constitution protects the freedom of conscience and right freely to profess, practise and propagate religion, but it does not protect secular activities. In Ratilal v. State of Bombay, A.I.R. 1953 Bom 242 (B), Chagla, C. J., said as follows.

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A religion may have many secular activities, it may have secular aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution. There are religions which bring under their own cloak every human activity. There is nothing which a man can do; whether in the way of clothes or food or drink, which is not considered a religious activity. But it would be absurd to suggest that a Constitution for a secular State ever intended that every human and mundane activity was protected under the guise of religion.

(6) As I have stated above, the College has been opened by a Christian Missionary Society, and is being run on what is called 'Christian Principles'. However beneficial or salutary have been the services of Christian Missionary Societies, such services have not been rendered without an objective. Christianity is a proselytising religion and the object of Missionaries in opening institutions of this description is primarily to propagate the Christian religion, and to gain converts, although secondarily it is based on the larger ground of service to humanity. The propagation of religion is effected through such humanitarian services, which are calculated to attract people to the Christian way of living and thinking, but without the application of force or compulsion. So far as Christians are concerned, they form a minority community in India. Under Art. 30 of the Constitution, Christian institutions opened primarily for the propagation of Christian religion and secondarily for rendering humanitarian services are within the bounds of law. There is nothing illegal in laying down conditions under which such services can be availed of, provided the conditions do not militate against public order, morality or health. In other words, provided that these institutions and the restrictions imposed therein do not violate ethical principles, or do not subvert public order, morality or health of the people, there can be no objection to laying down restrictions in the practise of religion as could be carried out within the precincts of such an institution. Such an institution could not compel any one to profess or practise the Christian religion, but it can lay down that all religious practices which will be carried out inside its precincts, should be in conformity with Christian principles. To carry the explanation a little further, such an institution cannot interfere with the belief and profession of religion, but it can control the outward manifestation of it within the boundaries of its property. Mr. Chatterjee has argued that so far as Hindus are concerned, their religion enjoins idolatry and it is not possible for them to profess and practise their religion except through this particular form of worship. I regret to say that this statement is both incorrect and superficial. The Hindu religion is an adventurous journey from the form to the formless. The peripatetic soul of a Hindu travels through myriad lives until it can drop the illusion of form.



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But meanwhile, it may gaze upon the serene face of the Goddess, in whose pure and luminous form is embodied the wisdom of the ages, and in whose hand is the celestial 'Vina', bringing the music of eternity to the ears of those who have ears to hear and the spirit to understand. But such things are only for the initiated. There is no question of thrusting our Gods upon others. Indeed, the Hindu religion, being a non-proseletysing religion absolutely forbids it, and the genius of our Constitution, gives it no encouragement. The students of this particular College have been clearly told in the prospectus that while the practice of individual devotion will not be interfered with, it will not be possible for the College to allow the performances of worship, or as it has been called 'Corporate worship', which it is stated, militates against Christian principles. In other words, all idol worship is banned within the boundaries of the College. The petitioner entered the College knowing that there is a limitation on the practice of worship within the precincts of the institution. He was not compelled to enter the institution, or to avail himself of its services. But having done so, he cannot turn round and ask the College authorities to violate the basic principles upon which the institution has been founded, and contrary to the principles which have been laid down by its founders. Such action on their part would inevitably result in the Church Missionary Society cancelling the licence to use the lands and buildings, without which the College cannot be run. In other words, there will be a violation of the conditions of the Trust upon which the institution has been granted the facility of using the lands and buildings, without which there can be no College. This Court has no ecclesiastical jurisdiction. India is not a Hindu State, but a secular State, where citizens may be Hindus or Christians or Moslems, but they are equally citizens of the State and their Gods cannot separate them. Consequently, the Court cannot enforce the practice of any religion nor prohibit it, unless it militates against the provisions of the Constitution. Our Constitution, so far as I can see, has been broad-based on absolute tolerance of all religions. In enforcing the Constitution, the Court cannot therefore invade private rights or interfere in the observances of religious scruples and practices, which are not contrary to the Constitution, and are not contrary to ethical principles or declared illegal by any law in existence. Such action would not uphold the Constitution but destroy it.

(7) The result is that in so far as this application is intended to force the hands of the authorities to allow idol-worship being conducted within the precincts of the College, it must be declared to be misconceived and consequently rejected.

NOTE: Is the right asserted here by the College one that the Constitution gives only to minorities? Or is it available to any religious group? Suppose a Hindu college barred non-Hindu worship in its premises?

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SRINIVASA AIYAR v. SARASWATHI AMMAL

A.I.R. 1952 Mad. 193

.....

ORDER: These eight petitions have been posted before us as they raise the important question of the validity of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, Madras Act VI of 1949 (hereinafter called the Act). . . a second marriage could be contracted with impunity under the personal law governing the Hindus and Mahomedans. The Act was placed on the Statute Book with the object of prohibiting bigamous marriages among [Hindus], as the preamble shows, and to provide for a right of divorce for, Hindus in the Province of Madras. S. 2(1) defines "Hindu" as meaning

- (a) a person professing the Hindu religion in any of its forms or developments, including a Virashaiva or Lingayat or a member of the Brahmo, Prarthana or Arya Samaj or
- (b) a person professing the Buddhist, Jaina or Sikh religion.

The other parties of the section not being relevant need not be quoted. The Act is made applicable by S. 3 to Hindus domiciled in the Province of Madras and the explanation to that section states that the Act shall also apply if either of the parties to the marriage was a Hindu domiciled in the Province of Madras. S. 4 declares bigamy to be void and makes it punishable. Sub-s. (1) to S. 4 runs thus:

Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnization shall be void whether the marriage is solemnized within or outside the Province of Madras.

Omitting the proviso and the explanation to this sub-section, there is sub-s. (2) which is relevant and which states:

If a party to a marriage which is void under sub-s. (1) has completed eighteen years of age at the time of the solemnization of such marriage, he or she shall be deemed to have committed an offence under S. 494 or S. 495 I.P.C. [Indian Penal Code] as the case may be.



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The effect of sub-s. (1) is undoubtedly to modify that part of the personal law of Hindus relating to marriage which permitted bigamy as a consequence of which the second marriage would be void and would attract the provision in S. 494 I.P.C. By Sub-s. (2) it is further provided that he or she shall be deemed to have committed an offence under S. 494 or 495 I.P.C. The validity of the Act was impugned on the ground that it offends the fundamental rights recognised under the Constitution in Arts. 14, 15 and 25 and that as the provisions of the Act are inconsistent with the provisions of Part III of the Constitution, it is claimed that to the extent of such inconsistency, the Act should be held to be void within the meaning of Art. 13(1) of the Constitution. . . .

(2) Though reference was made in the course of the argument to Art. 14 of the Constitution also, reliance on behalf of the petitioners who impugned the validity of the Act was placed only on Arts. 15 and 25. Under Art. 15(1) the State is prohibited from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The contention strongly pressed before us was that the Act in question selected the Hindus for this kind of discriminatory legislation leaving the Muhammadans out of consideration altogether. While permitting the Mahomedans to continue under their personal law to marry more than one wife, the Act in the case of Hindus prohibits bigamy and makes it an offence. In support of this, the decision of the Full Bench of this Court in what is known as the Communal G. O. case 'Champakam Dorairajan v. The State of Madras,' 1950-2 Mad L J 404 was cited. The Communal G. O. was declared invalid by the Full Bench on the ground that it discriminated against citizens because of caste. . . . Prima facie, the argument advanced on behalf of the petitioners seems to be attractive and lends support to the view that discrimination was made between Hindus and Mohamedans on this question of the right to marry more than one wife. But the point for consideration is, does discrimination proceed on the ground of religion? It is common knowledge that from early times when the British acquired the administration over this country, the personal law was applied in the case of Hindus and similarly in the case of Mohamedans also, their personal law was applied in certain matters. It is unnecessary to subject these provisions of the Statutes bearing on this question to a detailed examination as the learned Advocate General has done in the course of his argument as the proposition cannot be contested. Art. 14 of the Constitution is a general article guaranteeing to a person that a State shall not deny him equality before the law or the equal protection of the laws. As a corollary to this, we have Arts. 15 and 16 which prohibit discrimination

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on the ground of religion, race, caste, sex, place of birth in the case of citizens. It is no doubt true that the decisions have established that Art. 14 does not prevent classification based on reasonable ground for specified objects. The principles which should govern the application of Art. 14 have been laid down and summarised by Fazl Ali J. in the Bombay Prohibition case, the 'State of Bombay v. Balsara,' 1959 SCJ 478 at 491 in the form of propositions. The learned Judge also cited with approval the passage from Prof. Willis' book dealing with the fourteenth amendment to the Constitution of the United States in which the learned author summed up the law relating to the guarantee of equal protection of laws under the Constitution of the United States. The application therefore of that article in view of the clarification made by the Supreme Court does not present any difficulty. As pointed out by Fazl Ali J. the classification is bound to produce some inequality to a certain degree but that would not be enough to invalidate a law so long as the law deals equally within the members of a well defined class. The classification which is permissible however should not be based upon unreal and unsubstantial grounds and should not be arbitrary and without any substantial basis. If the statute however prohibits classification on a particular basis as do Arts. 15 and 16 of the Constitution, the law cannot be justified on the ground that notwithstanding that it contravenes the prohibition it is valid on the ground that it attempts at a reasonable classification based upon real, substantial and reasonable grounds.

(3) Bearing these principles in mind, the contention that the impugned legislation infringes the rights recognised under Art. 15 as it is based on discrimination of religion and religion only, may now be examined. . . . [The Constitutional provisions conferring legislative power refer to marriage, divorce, adoption, etc.] Legislative power therefore is conferred . . . to enact laws, amend or alter or repeal parts or whole of the personal law as is clear from the fact that adoption, joint family and partition are matters peculiar to Hindu Law and do not relate to any other law. Prima facie therefore the legislative power of the State Legislatures legitimately extends to affect the personal law of the Hindus. That does not however mean that this legislative power could abrogate the fundamental rights in Part III of the Constitution. But it is surely an indication that it recognises the classification already in existence that a section of the people, viz., the Hindus are subject to a system of law peculiar to them. The essence of that classification is not their religion but that they



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have all along been preserving their personal law peculiar to themselves which was derived from the Smritis, commentaries, custom and usage, in the same manner in which the Mohamedans are subject to their personal law. It is that personal law that was now sought to be affected by the Act to the extent of modifying and abrogating the rule that a Hindu is entitled to marry any number of wives without restriction; in other words of abolition of polygamy. The argument of the learned Advocate General therefore that the Act does not offend on the ground of discrimination based on religion seems to be sound. . . . If the argument of the petitioners were to be accepted, most of the personal law of the Hindus may have to go as there are fundamental differences on various matters between the personal law of the Hindus and the personal law of the Mohamedans. The petitioners' learned advocate however did not go to that length in the course of the arguments before us. It is a classification of persons which existed from a long time not based solely on the ground of religion but based on considerations peculiar to each of the communities, Hindus and Mohamedans. Hindu law, as is well known, had a peculiar growth and was to a large extent modified by legislation and also by judicial decisions during the British period and it is therefore difficult to accept the contention that the law applicable to Hindus is a law which discriminates against citizens on the ground 'only' of their religion.

(4) The next argument was based upon Art. 25 (1) of the Constitution which confers upon persons freedom of conscience and the right freely to profess, practise and propagate religion. It is said that the prohibition enacted by the Act against polygamy and preventing a man from marrying a second wife when the first was alive takes away the right of the person freely to practise his religion. It is essential no doubt, according to Hindu law, that a man should have a son for the discharge of the three debts to which a person is subject after his birth and for the performance of religious ceremonies which are calculated to conduce to the spiritual welfare of the deceased father. If a person is not able to get a son by his first wife, he may have to marry a second wife with a view to produce a son. The free practice of religion therefore, it is said was prohibited by the Statute. It is rather difficult to accept this argument. If a man has no natural son born by his first wife, the law recognises the right to adopt a son to perpetuate his lineage and to continue his line. The adopted son serves the same purpose from the point of view of religion as the natural born son. A person therefore if he is prevented from marrying a second wife is not thereby prevented from the free practise of his religion. It is more a matter of sentiment even if the belief that he would procure a son by a second marriage is well founded. It is unnecessary to refer to the decisions of the

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of the Supreme Court, United States which have been referred to by the learned Advocate-General in the course of the arguments. They do not throw much light on the question now in controversy. In the case of 'Reynolds v. United States,' (1879) 98 U.S. 145 at 166-167, which also related to the validity of a Statute prohibiting polygamy, it was pointed out that:

Laws are made for the Government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil Government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed that it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil Government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practice to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

We have quoted this passage to show that this freedom to practise religion is not an absolute right but as Art. 25 itself states it is subject to public order, morality and health and subject to the other provisions of this part. Art. 25 (2) further empowers the legislature to enact a law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The religious practice therefore may be controlled by legislation if the State thinks that in the interests of social welfare and reform it is necessary to do so. The argument therefore that the legislation contravenes the rights under Art. 25 (1) of the Constitution is without any force and must be rejected.

(5) It follows therefore that the Act is valid and these petitions must be dismissed.

NOTE: Do you agree with the following:

. . . The Madras High Court here indulged in a bit of mere sophistry.

The strained interpretations of the courts notwithstanding, there is absolutely no doubt that such legislation is discriminatory and contrary to Article 15(1). This is not to suggest that the courts should have declared these laws unconstitutional. During this transitional period when India is struggling to become a modern state, it is precisely



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the function of the courts to concoct such ingenious interpretations in order to harmonize the permanently valid principle, article 15(1) in this case, with the dynamic urge for social reform which still has to find expression within the antiquated framework of religious civil laws. Not only the Hindu Bigamous Marriages Act, but the whole system of Hindu and Muslim personal laws is contrary to Art. 15(1). It is only where there is a uniform civil code that the courts will be able to afford the luxury of a natural and straightforward interpretation of this fundamental constitutional principle of the secular state. (Donald Eugene Smith, India as a Secular State [Princeton, 1963], p. 116.)*

If Art. 15 (1) is read to forbid separate 'personal laws,' might not Art. 25 be read to require the state to permit such laws? Does the guarantee in Art. 25 offer something more than protection from religious discrimination? What matters does it place beyond the power of the state? Or can the state regulate anything under the heading of "social reform"?

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THE STATE OF BOMBAY v. NARASU APPA MALI

A.I.R. 1952 Bombay 84

Chagla, C.J. and Gajendragadkar, J.

July 24, 1951

.....
Chagla, C. J.-- These two appeals and one application for revision and one reference raise the same question with regard to the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. . . .

(2) The Act is placed on the statute book in order to provide for the prevention of bigamous marriages among Hindus, and by the definition section "Hindus" include Sikhs, Jains, Buddhists followers of the Arya or Brahmo Samaj or convert Hindus. Section 4 renders bigamous marriages void if they are contracted within the State after the coming into force of the Act and if they are contracted beyond the limits of the State after the coming into force of the Act and either or both the contracting parties to such marriage are domiciled in the State. Section 5 provides that notwithstanding any law, custom or usage to the contrary, whoever not being a minor (and a minor is a person under 16 years of age) contracts a bigamous marriage shall, on conviction, be punishable with imprisonment for a term which may extend to seven years and shall, on conviction, be punishable with imprisonment for a term which may extend to seven years and shall also be liable to fine. Section 6 penalizes persons who perform, conduct or abet any bigamous marriage in the State. Section 7, with which we are not concerned, provides penalty for a person having charge of a minor concerned in a bigamous marriage, and S. 9 makes the offences cognisable.

(3) The Act is challenged as contravening the fundamental rights guaranteed under Arts. 14, 15 and 25 of the Constitution. As Art 25 has a considerable bearing on the argument advanced in respect of Arts. 14 and 15, it would be better perhaps to deal with that article first. Article 25 (1) confers upon all persons the right to freedom of conscience and the right freely to profess, practise and propagate religion. That right is not an absolute or unlimited right. In the first place, it is subject to public order, morality and health. In the second place, it is subject to the other provisions of Part III--in other words, the right to profess, practise and propagate religion can only be exercised without contravening any of the fundamental rights embodied in Part III of the Constitution. The right under Art. 25 (1) is further subject to the



right of the State to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice, and it is further subject to the right of the State to provide by legislation for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

(4) It has been urged before us that among Hindus the institution of marriage is a sacrament, and that marriage is part of Hindu religion which is regulated by what is laid down in the Shastras. It is further pointed out that a Hindu marries not merely for association with his mate, but in order to perpetuate his family by the birth of sons. It is only when a son is born to a Hindu male that he secures spiritual benefit by having someone who can offer oblations to his own shade when he is dead and to the shades of his ancestors, and that there is no heavenly region for a sonless man. Therefore, the institution of polygamy is based upon the necessity of a Hindu obtaining sons for the sake of religious efficacy.

(5) Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole. A very interesting and instructive case is to be found in the American Reports, viz. Davis v. Beason (1889) 133 U.S. 637. In that case it was contended that polygamy was part of the creed of the Mormon Church and any legislation which penalises polygamy to the extent that it affected Mormons was contrary to the First Amendment of the Constitution which provided that Congress shall not make any law respecting the establishment of religion or forbidding the free exercise thereof. This argument was rejected, and Mr. Justice Field delivering the opinion of the Court pointed out that (p. 640):

The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.

He further pointed out that the First Amendment could not be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. He further pointed out that (p. 640):



Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

Further on he states (p. 640):

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

It is only with very considerable hesitation that I would like to speak about Hindu religion, but it is rather difficult to accept the proposition that polygamy is an integral part of Hindu religion. It is perfectly true that Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. That same religion also recognizes the institution of adoption. Therefore, the Hindu religion provides for the continuation of the line of a Hindu male within the frame-work of monogamy.

(7) But even assuming that polygamy is a recognized institution according to Hindu religious practice, the right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly, a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Art. 25 (2) (b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion. A question has been raised as to whether it is for the Legislature to decide what constitutes social reform. It must not be forgotten that in a democracy the Legislature is constituted by the chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is for them to determine what legislation to put upon the statute book in order to advance the welfare of the State. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the Courts of law to sit in judgment upon that decision. Therefore, in our opinion, this legislation does not contravene Art. 25 (1) of the Constitution.

(8) Coming to Arts. 14 and 15(1), it should be borne in mind that these articles are two facets of the same fundamental right. Both emphasise the equality

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before the law. It is true that whereas Art. 14 confers the right upon every person, the right given under Art. 15(1) is confined to the citizens of India. But if there is any discrimination in law, then the law would not have an equal application to all persons, unless the discrimination can be justified on some reasonable basis or the distinction made has some reasonable relation to the subject of the legislation. Article 15(1) further emphasises the fact that any discrimination which is based only on the ground of religion, race, caste, sex or place of birth can never be a reasonable discrimination. Article 15(1) itself assumes that there may be discrimination on other grounds. But whether such discrimination is good or not would depend upon the principles applicable to the construction of Art. 14. As I just said, it would depend upon the discrimination being based not upon arbitrary, capricious or oppressive grounds, but grounds which are reasonable.

(9) Now, what has been argued before us is that the Hindu community in Bombay has been picked out for this legislation prohibiting polygamy. It is pointed out that polygamy is prevalent and permissible among Muslims living in the State of Bombay and yet the Muslims may marry more than one wife with impunity while a Hindu doing the same is made liable to severe penalty. It is impressed upon us that our Constitution sets up a secular State, that Art. 44 contains a directive to the State to secure for the citizens a uniform Civil Code throughout the territory of India, and still the State of Bombay by this legislation has discriminated between Hindus and Muslims only on the ground of religion and has set up a separate Code of social reform for Hindus different from that applicable to the Muslims. The Solicitor General has argued that if monogamy is a measure of social reform and that measure is made applicable to Hindus only, the Hindus cannot complain that they have been discriminated against. According to him the expression "discriminate" suggests some infirmity or some disability being cast upon the person discriminated against. Perhaps that is not quite a satisfactory answer because we have to consider Arts 14 and 15 (1) together, and even apart from discrimination if a law did not operate equally upon all citizens, then it would be bad unless we could find some reasonable basis for excluding a section of the community from the operation of the law.

(10) There can be no doubt that the Muslims have been excluded from the operation of the Act in question. Even S. 494, Penal Code, which makes bigamy an offence applies to Parsis Christians and others, but not to Muslims because polygamy is recognised as a valid institution when a Muslim male marries more

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than one wife. The question that we have to consider is whether there is any reasonable basis for creating the Muslims as a separate class to which the laws prohibiting polygamy should not apply. Now it is an historic fact that both the Muslims and the Hindus in this country have their own personal laws which are based upon their respective religious texts and which embody their own distinctive evolution and which are coloured by their own distinctive backgrounds. Article 44 itself recognises separate and distinctive personal laws because it lays down as a directive to be achieved that within a measurable time India should enjoy the privilege of a common uniform Civil Code applicable to all its citizens irrespective of race or religion. Therefore, what the Legislature has attempted to do by the Hindu Bigamous Marriages Act is to introduce social reform in respect of a particular community having its own personal law. The institution of marriage is differently looked upon by the Hindus and the Muslims. Whereas to the former it is a sacrament, to the latter it is a matter of contract. That is also the reason why the question of the dissolution of marriage is differently tackled by the two religions. While the Muslim law admits of easy divorce, Hindu marriage is considered indissoluble and it is only recently that the State passed legislation permitting divorce among Hindus. The State was also entitled to consider the educational development of the two communities. One community might be prepared to accept and work social reform; another may not yet be prepared for it; and Art. 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be communitywise. From these considerations it follows that if there is a discrimination against the Hindus in the applicability of the Hindu Bigamous Marriages Act that discrimination is not based only upon ground of religion. Equally so if the law with regard to bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reasonable grounds.

.....
(15) Under the circumstances, we are of the opinion that the Hindu Bigamous Marriages Act, 1946, is a valid Act.
.....

(17) Gajendragadkar J.--I agree. I have had the advantage of reading the judgment just delivered by the learned Chief justice. I, however, wish to express my conclusions on some of the points urged before us in these appeals.
.....



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. . . [T]he framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression 'laws in force.' Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Art. 13 (1) at all.

(24) I would, however, like to add that even if it is held that personal laws fall within Art. 13(1), I am not satisfied that the provisions of these personal laws permitting polygamy, amount to a discrimination against women only on the ground of sex. It has often been emphasised in interpreting Art. 15 (1) that the importance of the word "only" should not be minimised; this word in fact can be described as the keyword in the article. It is not all discriminations which may, incidentally and in a subsidiary way, be referable to religion, race, caste, sex or place of birth that are prohibited. It is only when discrimination against a citizen can be referred to no other reasonable ground that it falls within the mischief of Art. 15 (1). There can be little doubt that the institution of marriage like all social institutions is the result of contemporary social conditions. The rules prescribed for marriages are determined by the social and economic condition of the society. In dealing with these rules, it is also necessary to remember the obvious natural differences between the sexes themselves and considerations which may legitimately arise from these differences. It may well be that when polygamy was allowed both amongst Hindus and Mahomedans, these material conditions may have justified the rule as to polygamy. So far as the Hindus are concerned, Dr. Kane in his History of Dharmasastra has critically examined all the material texts bearing on the question of polygamy and has come to the conclusion that "one must not be carried away by the notion that marrying many wives was either very common or was not looked down upon amongst the Hindus. (Vol. II, Part I, p. 553). With this conclusion I respectfully agree. It is true that right down from the Vedic times we find several texts permitting polygamy and in that sense it cannot be denied that polygamy was not prohibited at any stage. But, on the other hand, the impression which one forms on looking at all the texts is that monogamy was always treated as an ideal. Some texts have in fact condemned polygamy in unmistakable terms. The Apastamba Dharma Sutra,

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for instance, prescribes that one who abandons his (faultless) wife should put on the skin of an ass with the hair outside and should beg for alms at seven houses for six months (I 10.28.19). Marriage amongst the Hindus has been treated as a sacrament and the birth of a son has always been held to be a source of spiritual benefit by the Hindu texts. The Hindu texts, therefore, permitted a Hindu to marry a second wife in case his first wife does not give birth to progeny or more particularly to a son. Manu and Yajnyavalkya both say that a husband may supersede his wife and marry another if she drinks wine, suffers from a disease of long standing, is deceitful, is extravagant in expenditure, speaks harsh words and gives birth to female children only (Manu V. 80, Yaj. I, 80). It is unnecessary to refer to the other texts bearing on this point; but the conclusion seems to me to be inevitable that these texts, however harsh they may appear in permitting polygamy, cannot be said to have discriminated against women only on the ground of sex. The desire for a son who, according to the texts, confers spiritual benefit upon his ancestors was principally responsible for the permission granted to Hindu husbands to marry a second time, and if that is so, it would not be possible to hold that in granting such permission Hindu law discriminated against women solely on the ground of sex. Incidentally it may be pointed out that both according to Steel ("Law and Custom of Hindoo Castes," p. 168, Edn. of 1868) who had very great opportunities for observing the practices of numerous castes in the State of Bombay and according to the Imperial Gazetteer of India (Vol. I, p. 482), although in theory polygamy was allowed amongst the Hindus its incidence in practice was not very wide. In my opinion, therefore, the provisions of the personal laws permitting polygamy cannot be said to offend against Art. 15(1). It is quite true that the social and economic conditions which may once have justified these provisions are not present today and that a reform in that direction is overdue. But the impugned Act itself attempts to make such a reform and in substance it seeks to remove the hardships and disabilities from which Hindu women were suffering so long.

(25) In my opinion, therefore, even if the personal laws are held to fall within Art. 13 (1), the material provisions of these laws permitting polygamy do not offend against Art. 15 (1) and are therefore not void. In that view of the matter, it is impossible to hold that the impugned Act discriminates against the Hindus in preference to the Mahomedans.

(26) The next question is whether this Act discriminates against the Hindus in reference to the Christian and the Parsi citizens of this State, in so far as it subjects the Hindus alone to the specially severe provisions as to



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punishment and procedure. It is true that whereas under the general criminal law the offence of bigamy is cognizable only on the complaint of the wife, the impugned Act makes it cognizable so that the complaint of the wife, is unnecessary to start the proceedings against the offending husband. The offence of bigamy is compoundable under the general criminal law; but not under the impugned Act; and the word "abettor" under the impugned Act is also wider than under the Indian Penal Code. These provisions in fact are alleged to constitute discrimination against the Hindus. In dealing with this question, however, it must be remembered that the Legislature may have thought that the evil of bigamy prevailing amongst the Hindus could not be effectively put down unless the offence was made cognizable and unless amongst the abettors were included even the priests who officiate at Hindu marriages. As I have already mentioned, Hindu marriage is a sacrament and not a contract and the sentimental love and devotion of the Hindu wife for her husband is well known. Legislature may well have thought that it would be futile to make the offence of Hindu bigamy punishable at the instance of the wife because Hindu wives may not come forward with any complaint at all. Amongst the Christians and the Parsis, monogamy has been practised for several years and marriage amongst them is a matter of contract. Amongst them divorce is permissible, whereas amongst the Hindus it was not permissible for so many years. If the Legislature acting on these considerations wanted to provide for a special procedure in dealing with bigamous marriages amongst the Hindus it cannot be said that the Legislature was discriminating against the Hindus only on the ground of religion. It was for the Legislature to take into account the social customs and beliefs of the Hindus and other relevant considerations before deciding whether it was necessary to provide for special provisions in dealing with bigamous marriages amongst them. That clearly is the province of the Legislature and with the propriety of their views or their wisdom Courts are not concerned. I, therefore, hold that there is no substance in the argument that the penal provisions of the impugned Act constitute discrimination against the Hindus only on the ground of religion. I may incidentally point out that the word "Hindu," as used in the Act, is not confined only to Hindus as commonly understood, but it includes Sikhs, Jains, Buddhists, the followers of the Arya or Brahma Samaj and converts to Hinduism.

(27) There is one more point with which I would like to deal. It has been argued before us that the impugned Act should have been made applicable to the Mahomedan citizens of the State of Bombay. It is said that if the impugned Act constitutes a measure of social reform, there is no reason why the State Legislature

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should not have given the Mahomedan community the benefit of this social reform. The Union of India is a secular State and the State Legislature was wrong in making a distinction between its citizens on the ground of religious differences and in applying the provisions of the impugned Act only to Hindus. In part this argument is political and as such we are not concerned with it. But part of the argument is based upon the provisions of Art. 14 of the Constitution of India and it is necessary to deal with this aspect of the argument.

(29) Article 25 of the Constitution guarantees freedom of conscience and free profession, practice and propagation of religion to all the citizens of the Union of India. But this article itself makes it perfectly clear that the freedom guaranteed by it is subject to some exceptions. First and foremost, this freedom is subject to public order, morality and health, as well as to the other provisions of Art. 25 (2) by which the State is given full power to make laws providing for social welfare and reform. In other words, if the State makes a law for social welfare and reform, it would not be a proper argument against the validity of such legislation to urge that the measure of social welfare and reform impinges upon the religious freedom of any section of the citizens of India. Religion in a modern democratic State is purely a matter of the individual and his God; with the religious beliefs of the citizen and his religious practices normally the State would not interfere. But if these religious beliefs or practices conflict with matters of social reform or welfare on which the State wants to legislate, such religious beliefs or practices must yield to the higher requirements of social welfare and reform. This, in my opinion, is the plain meaning of the provisions of Art. 25 (1) and Art. 25 (2) read together. If that is so, it is futile to contend that in passing the present Act the State Legislature has trespassed upon the religious beliefs of the Hindus.

(29) But apart from that, I am not prepared to hold that the impugned Act infringes upon the religious beliefs or practices of the Hindus. I do not deny that marriage under Hindu law is a matter of sacrament and I concede that the Hindu texts have emphasised the importance of a son for the purpose of spiritual benefit. But it must be remembered that the ancient Sanskrit texts made no distinction between religion and its practice on the one hand and matters of positive or civil law on the other. The study of any of the Smritis or other Sanskrit texts of Hindu law would show that the ancient Hindu writers discussed all problems in religious terms. The whole of the human activity from the birth of a person to his grave is given a religious complexion, and in dealing with all actions in human life considerations of religion and metaphysics are throughout mixed up. It is, therefore, necessary to distinguish between matters which



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legitimately fall within the ambit of religion and its practice and those that do not. Speaking for myself, I would not be prepared very easily to accede to the argument that legislative interference with the provisions as to marriages in fact constitutes an infringement of the Hindu religion or its practice. Besides, even from the strictly orthodox point of view bigamy was never a matter of obligation; it was permissive and permissive under certain conditions and for a certain object. If the principal object of permitting polygamy was to attempt to obtain a son, the same object could well be served by adoption. It is well recognised that the adopted son under the Hindu texts confers the same spiritual benefit which a natural born son does. Therefore, in my opinion, there is no substance in the argument that by prohibiting bigamy the State Legislature has infringed upon Hindu religion or its practice. But as I have already said, even if the State Legislature has infringed upon Hindu religion or its practice as alleged, it would be perfectly competent for the State Legislature to do so, if it is legislating for social welfare and reform. It would be impossible to contend that in passing the impugned Act the State Legislature was not providing for social welfare or reform. In fact, in so far as the impugned legislation removes the disabilities and hardships caused by polygamy to women, it in effect brings the Hindu law in conformity with the fundamental rights guaranteed to women along with the men in this country.

(30) But it is argued that even as to this social reform, the State Legislature should have made it all pervasive and should not have left the Mahomedans outside its ambit. That, as I have already said, is partly a political, and partly a legal argument. Whether it was expedient to make this Act applicable to the Mahomedans as well as to the Hindus would be a matter for the Legislature to consider. It is now well settled that the equality before the law which is guaranteed by Art. 14 is not offended by the impugned Act if the classification which the Act makes is based on reasonable and rational considerations. It is not obligatory for the State Legislature always and in every case to provide for social welfare and reform by one step. So long as the State Legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that the equality before law is offended. The State Legislature may have thought that the Hindu community was more ripe for the reform in question. Social reformers amongst the Hindus have agitated for this reform vehemently for many years past and the social conscience of the Hindus, according to the Legislature, may have been more in tune with the spirit of the proposed reform. Besides, amongst the Mahomedans divorce has always been permissible and marriage amongst

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them is a matter of contract. If the State Legislature acting on such considerations decided to enforce this reform in the first instance amongst the Hindus, it would be impossible in my opinion to hold that in confining the impugned Act to Hindus as defined by the Act it has violated the equality before law as guaranteed by Art. 14. In my opinion, therefore, the argument that Art. 14 is violated by the impugned Act must fail.

(31) In the result I agree with the learned Chief Justice in holding that the impugned Act is valid and must be enforced.

NOTE: In 1955-56 a series of bills collectively known as the Hindu Code were enacted. They completely revised the personal law of the Hindus. (See Appendix).

What is the source of the view of "religion" found in these cases. Would there be anything outside the scope of the state's power to enact social reforms? What would be the import of such a development for Indian society?

Do you agree with the following:

Among the Fundamental Rights dealt with by the Constitution, those relating to freedom of religion stand in a special category. The importance of Articles 25 and 26 lies not so much in the grants of religious liberty but in its restriction. . . . For the first time in Indian legal history, the regulation of religious freedom is envisaged and sanctioned by the organic law. . . . the sphere of law will inevitably tend to encroach on the hitherto preserves of religion. (N. A. Subramaniam, "Freedom of Religion," Journal of the Indian Law Institute, Vol. 3, pp. 323-50 at 350, [1961])*

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THE COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS, v.
SRI LAKSHMINIDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT

1954 Supreme Court Reports 1005

March 16, 1954

Before Mehr Chand Mahajan, C.J., Mukerjee, S.R. Das, Vivian
Bose, Ghulam Hasan, Bhagwati and Venkatarama Ayyar, JJ.

[Petitioner is the superior of Mathadhipati of a Math, known as Shirur Math, which is one of the eight Maths situated at Udipi in South Kanara district. He here objects to various provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951. A long description of the background of the litigation and a lengthy consideration of property rights of petitioner are omitted. The question before the court is the constitutionality of the various controls which the Act empowers the commissioner to exercise in respect to the Math.]

.....

As regards article 26, the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name." It is well known that the practice of setting up Maths as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name,--in many cases it is the name of the founder,--and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As article 26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article.

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The other thing that remains to be considered in regard to article 26 is, what is the scope of clause (b) of the article which speaks of management "of its own affairs in matters of religion?" The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply. The question is, where is the line to be drawn between what are matters of religion and what are not?

It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the article applies. What then are matters of religion? The word "religion" has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case (Vide Davis v. Beason, 133 U.S. 333 at 342), it has been said "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cultus of form or worship of a particular sect, but is distinguishable from the latter." We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) of the Constitution of Eire and we have great doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe



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rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in article 25. Latham C. J. of the High Court of Australia while dealing with the provision of section 116 of the Australian Constitution which inter alia forbids the Commonwealth to prohibit the "free exercise of any religion" made the following weighty observations (Vide Adelaide Company v. The Commonwealth 67 C.L.R. 116, 127):

It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religions opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under articles 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon clause (2) (a) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or oblations to the sacred fire, all these would be regarded as parts of religion.

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and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b). What article 25(2) (a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as "Jehova's Witnesses." This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of "Jehova's Witnesses" incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them under the National Security Regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations (Vide Adelaide Company v. The Commonwealth, 67 C.L.R. 116, 127.). These were undoubtedly political activities though arising out of religious belief entertained by a particular community. In such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery.

The courts of America were at one time greatly agitated over the question of legality of a State regulation which required the pupils in public schools on pain of compulsion to participate in a daily ceremony of saluting the national flag, while reciting in unison, a pledge of allegiance to it in a certain set



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formula. The question arose in Minersville School District, Board of Education, etc.. v. Gobitis (310 U.S. 586). In that case two small children, Lillian and William Gobitis, were expelled from the public school of Minersville, Pennsylvania, for refusing to salute the national flag as part of the daily exercise. The Gobitis family were affiliated with "Jehova's Witnesses" and had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by the scripture. The point for decision by the Supreme Court was whether the requirement of participation in such a ceremony exacted from a child, who refused upon sincere religious ground, infringed the liberty of religion guaranteed by the First and the Fourteenth Amendments? The court held by a majority that it did not and that it was within the province of the legislature and the school authorities to adopt appropriate means to evoke and foster a sentiment of national unity amongst the children in public schools. The Supreme Court, however, changed their views on this identical point in the later case of West Virginia State Board of Education v. Barnette (319 U.S. 624). There it was held overruling the earlier decision referred to above that the action of a State in making it compulsory for children in public schools to salute the flag and pledge allegiance constituted a violation of the First and the Fourteenth Amendments. This difference in judicial opinion brings out forcibly the difficult task which a court has to perform in cases of this type where the freedom or religious convictions genuinely entertained by men come into conflict with the proper political attitude which is expected from citizens in matters of unity and solidarity of the State organization.

As regards commercial activities, which are prompted by religious beliefs, we can cite the case of Murdock v. Pennsylvania (319 U.S. 105). Here also the petitioners were "Jehova's Witnesses" and they went about from door to door in the city of Jeannette distributing literature and soliciting people to purchase certain religious books and pamphlets, all published by the Watch Tower Bible and Tract Society. A municipal ordinance required religious colporteurs to pay a licence tax as a condition to the pursuit of their activities. The petitioners were convicted and fined for violation of the ordinance. It was held that the ordinance in question was invalid under the Federal Constitution as constituting a denial of freedom of speech, press and religion; and it was held further that upon the facts of the case it could not be said that "Jehova's Witnesses" were engaged in a commercial rather than in a religious venture. Here again, it may be pointed out that a contrary view was taken only a few years before in the case of Jones v. Opelika (316 U.S.584), and it was held that a city ordinance, which

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required that licence be procured and taxes paid for the business of selling books and pamphlets on the streets from house to house, was applicable to a member of a religious organisation who was engaged in selling the printed propaganda pamphlets without having complied with the provisions of the ordinance.

It is to be noted that both in the American as well as in the Australian Constitutions the right to freedom of religion has been declared in unrestricted terms without any limitation whatsoever. Limitations, therefore, have been introduced by courts of law in these countries on grounds of morality, order and social protection. An adjustment of the competing demands of the interests of Government and constitutional liberties is always a delicate and a difficult task and that is why we find difference of judicial opinion to such an extent in cases decided by the American courts where questions of religious freedom were involved. Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under article 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of article 26.



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Having thus disposed of the general contentions that were raised in this appeal, we will proceed now to examine the specific grounds that have been urged by the parties before us. . . .

[The following are a few short selections from the remainder of the court's opinion, which consists of detailed consideration of a variety of the provisions of the Act in the light of the foregoing.]

Section 20 of the Act describes the powers of the Commissioner in respect to religious endowments and they include power to pass any orders that may be deemed necessary to ensure that such endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded. Having regard to the fact that the Mathadhipati occupies the position of a trustee with regard to the Math, which is a public institution, some amount of control or supervision over the due administration of the endowments and due appropriation of their funds is certainly necessary in the interest of the public and we do not think that the provision of this section by itself offends any fundamental right of the Mahant. We do not agree with the High Court that the result of this provision would be to reduce the Mahant to the position of a servant. No doubt the Commissioner is invested with powers to pass orders, but orders can be passed only for the purposes specified in the section and not for interference with the rights of the Mahant as are sanctioned by usage or for lowering his position as the spiritual head of the institution. The saving provision contained in section 91 of the Act makes the position quite clear. An apprehension that the powers conferred by this section may be abused in individual cases does not make the provision itself bad or invalid in law.

We agree, however, with the High Court in the view taken by it about section 21. This section empowers the Commissioner and his subordinate officers and also persons authorised by them to enter the premises of any religious institution or place of worship for the purpose of exercising any power conferred or any duty imposed by or under the Act. It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any members of the public is allowed. Section 21, it is to be noted, does not confine the right of entry to the outer

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portion of the premises; it does not even exclude the inner sanctuary "the Holy of Holies" as it is said, the sanctity of which is zealously preserved. It does not say that the entry may be made after due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution. We think that as the section stands, it interferes with the fundamental rights of the Mathadhipati and the denomination of which he is head guaranteed under articles 25 and 26 of the Constitution. . . .

Section 56 has been rightly invalidated by the High Court. It makes provision of an extremely drastic character. Power has been given to the Commissioner to require the trustee to appoint a manager for administration of the secular affairs of the institution and in case of default, the Commissioner can make the appointment himself. The manager thus appointed though nominally a servant of the trustee, has practically to do everything according to the directions of the Commissioner and his subordinates. It is to be noted that this power can be exercised at the mere option of the Commissioner without any justifying necessity whatsoever and no pre-requisites like mis-management of property or maladministration of trust funds are necessary to enable the trustee to exercise such drastic power. It is true that the section contemplates the appointment of a manager for administration of the secular affairs of this institution. But no rigid demarcation could be made as we have already said between the spiritual duties of the Mahant and his personal interest in the trust property. The effect of the section really is that the Commissioner is at liberty at any moment he chooses to deprive the Mahant of his right to administer the trust property even if there is no negligence or maladministration on his part. Such restriction would be opposed to the provision of article 26 (d) of the Constitution. It would cripple his authority as Mahant altogether and reduce his position to that of an ordinary priest or paid servant.

NOTE: The Constitutional position of religious groups, we may conclude, is vastly different than that of caste groups. While both caste and religious groups are forbidden grounds for governmental discrimination, religious groups may be accorded differential treatment so long as it is not discriminatory. And religious groups are the beneficiaries of guaranteed freedoms from government restriction and control. Which groups enjoy such freedoms? What is a "religious denomination or section thereof?" Does this include caste groups (like the Sivalli Brahman)?

Why does the Supreme Court reject the "American" and "Bombay" views of "religion?" Why are they thought inappropriate for India?

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How does the Court propose to separate the "religious" from the "non-religious?" Does religion include everything that its votaries deem to be such? Is the community's estimate to be determinative? What consequences might such a view have for the government's legislative competence? Do the following excerpts from recent cases indicate a solution? (Both are from unanimous opinions, written by Mr. Justice Gajendragadkar, now Chief Justice of the Supreme Court.)

. . . [I]t may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other. (Durgah Committee v. Hussain Ali, A.I.R. 1961 Supreme Court 1402, 1415.)

(58) In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. . . .

(59) In this connection, it cannot be ignored that what is protected under Arts. 25 (1) and 26 (b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which

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is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Art. 25 (1) or Art. 26(b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practice religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matter of religion, then, of course, the right guaranteed by Art. 25 (1) and Article 26 (b) cannot be contravened.

(60) It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Arts. 25 (1) and 26 (b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Articles 25 (1) and 26 (b), Latham C. J.'s observation in *Adelaide Co. of Jehovah's witnesses v. Commonwealth*, 1943-67 Com-WLR 116 at p. 123 that "what is religion to one is superstition to another", on which Mr. Pathak relies, is of no relevance. If an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Art. 25 (1) and Art. 26 (b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Art. 25 (1) or Art. 26 (b). This aspect of the matter must be borne in mind in dealing with true scope and effect of Art. 25 (1) and Art. 26 (b). (*Shri Govindlalji v. State of Rajasthan*, A.I.R. 1963 Supreme Court 1638, 1960-61.)

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1965 -Galanter-Legal Material -Devchand Totaram Case (886)

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SRI VENKATARAMANA DEVARU AND OTHERS, Appellants v.

STATE OF MYSORE AND OTHERS, Respondents

A.I.R. 1958 Supreme Court 255

8th November, 1957

S. R. Das C. J., T. L. Venkatarama Aiyar, Jafer Imam, A. K. Sarkar
and Vivian Bose JJ.

.....
The Judgment of the Court was delivered by

VENKATARAMA AIYAR, J.:— The substantial question of law, which arises for decision in this appeal, is whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Art. 26 (b) is subject to, and can be controlled by, a law protected by Art. 25(2)(b), throwing open a Hindu public temple to all classes and sections of Hindus.

(2) In the District of South Kanara which formed until recently part of the State of Madras and is now comprised in the State of Mysore, there is a group of three villages, Mannampady, Bappanad and Karnad collectively known as Moolky Petah; and in the village of Mannampady, there is an ancient temple dedicated to Sri Venkataramana, renowned for its sanctity. It is this institution and its trustees, who are the appellants before us. The trustees are all of them members of a sect known as Gowda Saraswath Brahmins. It is said that the home of this community in the distant past was Kashmir, that the members thereof migrated thence to Mithila and Bihar, and finally moved southwards and settled in the region around Goa in sixty villages. They continued to retain their individuality in their new surroundings, spoke a language of their own called Konkani, married only amongst themselves, and worshipped idols which they had brought with them. Subsequently, owing to persecution by the Portuguese, they migrated further south, some of them settling at Bhatkal and others in Cochin. Later on, a chieftain who was ruling over the Moolky area brought five of these families from Bhatkal, settled them at Mannampady, erected a temple for their benefit and installed their idol therein, which came to be known as Tirumalaivaru or Venkataramana, and endowed lands therefor. In course of time, other families of Gowda Saraswath Brahmins would appear to have settled in the three villages constituting Moolky, and the temple came to be managed by members of this community residing in those villages.

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. . . [T]he Madras Temple Entry Authorization Act (Madras, V of 1947), hereinafter referred to as the Act, was passed by the Legislature of the Province of Madras. It will be useful at this stage to set out the relevant provisions of the Act, as it is the validity of S. 3 thereof that is the main point for determination in this appeal. The preamble to the Act recites that the policy of the Provincial Government was "to remove the disabilities imposed by custom or usage on certain classes of Hindus against entry into Hindu temples in the Province which are open to the general Hindu public." Section 2(2) defines "temple" as "A place by whatever name known, which is dedicated to or for the benefit of or used as of right by the Hindu community in general as a place of public religious worship." [According to the amended definition, a temple is "a place which is dedicated to or for the benefit of the Hindu community or any section thereof as a place of public religious worship." This Amendment Act came into force on 28-6-1959.] Section 3(1) enacts that,

Notwithstanding any law, custom or usage to the contrary, persons belonging to the excluded classes shall be entitled to enter any Hindu temple and offer worship therein in the same manner and to the same extent as Hindus in general; and no member of any excluded class shall, by reason only of such entry or worship, whether before or after the commencement of this Act, be deemed to have committed any actionable wrong or offence or be sued or prosecuted therefor.

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(12) On the arguments addressed before us, the following questions fall to be decided:

- (1) Is the Sri Venkataramana temple at Moolky, a temple as defined in S. 2(2) of Madras Act V of 1947?
- (2) If it is, is it a denominational temple?
- (3) If it is a denominational temple, are the plaintiffs entitled to exclude all Hindus other than Gowda Saraswath Brahmins from entering into it for worship, on the ground that it is a matter of religion within the protection of Art. 26(b) of the Constitution?
- (4) If is, is S. 3 of the Act valid on the ground that it is a law protected by Art. 25(2) (b), and that such a law prevails against the right conferred by Art. 26(b); and

(5) If S. 3 of the Act is valid, are the modifications in favour of the appellants made by the High Court legal and proper?

(13) On the first question, the contention of Mr. M. K. Nambiar for the appellants is that the temple in question is a private one, and therefore falls outside the purview of the Act. . . .



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. . . We hold, agreeing with the Courts below, that the Sri Venkataramana Temple at Moolky is a public temple, and that it is within the operation of Act V of 1947.

(14) (2) The next question is whether the suit temple is a denominational institution. . . . The learned Solicitor-General . . . firstly contends that even though the temple might have been dedicated to the Gowda Saraswath Brahmins, that would make it only a communal and not a denominational institution, unless it was established that there were religious tenets and practices special to the community, and that that had not been done. Now, the facts found are that the members of this community migrated from Gowda Desa first to the Goa region and then to the south, that they carried with them their idols, and that when they were first settled in Moolky, a temple was founded and these idols were installed therein. We are therefore concerned with the Gowda Saraswath Brahmins not as a section of a community but as a sect associated with the foundation and maintenance of the Sri Venkataramana Temple, in other words, not as a mere denomination, but as a religious denomination. From the evidence of P. W. 1, it appears that the Gowda Saraswath Brahmins have three Gurus, that those in Moolky Petah are followers of the head of the Kashi Mutt, and that it is he that performs some of the important ceremonies in the temple. Exhibit A is a document of the year 1826-27. That shows that the head of the Kashi Mutt settled the disputes among the Archakas, and that they agreed to do the puja under his orders. The uncontradicted evidence of P. W. 1 also shows that during certain religious ceremonies, persons other than Gowda Saraswath Brahmins have been wholly excluded. This evidence leads irresistibly to the conclusion that the temple is a denominational one, as contended for by the appellants.

(16) The second ground urged on behalf of the [State] is that the evidence discloses that all communities had been freely admitted into the temple, and that though P. W. 1 stated that persons other than Gowda Saraswath Brahmins could enter only with the permission of the trustees, there was no instance in which such permission was refused. It was contended that the inference to be drawn from this was that the Hindu public generally had a right to worship in the temple. . . . On the findings of the Court below that the foundation was originally for the benefit of the Gowda Saraswath Brahmin community, the fact that other classes of Hindus were admitted freely into the temple would not have the effect of enlarging the scope of the dedication into one for the public generally. On a consideration of the evidence we see no grounds for differing from the finding given by the learned Judges in the court below that the suit temple is a denominational temple founded for the benefit of the Gowda Saraswath Brahmins. . . .

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(3) On the finding that the Sri Venkataramana Temple at Moolky is a denominational institution founded for the benefit of the Gowda Saraswath Brahmins, the question arises whether the appellants are entitled to exclude other communities from entering into it for worship on the ground that it is a matter of religion within the protection of Art. 26(b). It is argued by the learned Solicitor-General that exclusion of persons from entering into a temple cannot ipso facto be regarded as a matter of religion, that whether it is so must depend on the tenets of the particular religion which the institution in question represents, and that there was no such proof in the present case. Now, the precise connotation of the expression "matters of religion" came up for consideration by this Court in Commissioner, Hindu Religious Endowments, Madras v. Kalshmindra Thirtha Swamiar, 1954 SCE 1005: (A.I.R. 1954 S.C. 282) (C) and it was held therein that it embraced not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not merely its Gnana but also its Bhakti and Karma Kandas. The following observations of Mukherjea, J., (as he then was) are particularly apposite to the present discussion:

"In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b)."

(17) It being thus settled that matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion, we have not to consider whether exclusion of a person from entering into a temple for worship is a matter of religion according to Hindu Ceremonial Law. There has been difference of opinion among the writers as to whether image worship had a place in the religion of the Hindus, as revealed in the Vedas. On the one hand, we have hymns in praise of Gods, and on the other, we have highly philosophical passages in the Upanishads describing the Supreme Being as omnipotent, Omniscient and omnipresent and transcending all names and forms. When we come to the Puranas,

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we find a marked change. The conception had become established of Trinity of Gods, Brahma, Vishnu and Siva as manifestations of the three aspects of creation, preservation and destruction attributed to the Supreme Being in the Upanishads, as, for example, in the following passage in the Taittiriya Upanishad, Brigu Valli, First Anuvaka:

"That from which all beings are born, by which they live and into which they enter and merge."

The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation. These injunctions have had such a powerful hold over the minds of the people that daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu. It was during this period that temples were constructed all over the country dedicated to Vishnu, Rudra, Devi, Skanda, Ganesha and so forth, and worship in the temple can be said to have become the practical religion of all sections of the Hindus ever since. With the growth in importance of temples and of worship therein, more and more attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of worship of the deity, and numerous are the treatises that came to be written for its exposition. These are known as Agamas, and there are as many as 28 of them relating to the Saiva temples, the most important of them being the Kamikagama, the Karanagama and the Suprabhedagama, while the Vikhanasa and the Pancharatra are the chief Agamas of the Vaishnavas. These Agamas, contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other Devatas are to be installed and where the several classes of worshippers are to stand and worship. The following passage from the judgment of Sadasiva Aiyar, J., in *Gopala Mooppanar v. Subramania Aiyar*, 27 Mad LJ 253: (A.I.R. 1915 Mad 363) (D), gives a summary of the prescription contained in one of the Agamas:

In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbhagriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram.

The other Agamas also contain similar rules.

(18) According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as Samprokshana) have to be performed for restoring the sanctity of the shrine: Vide Judgment of Sadasiva Aiyar, J., in *Gopala Muppanar v. Subramania Aiyar* (D) (supra). In *Sankaralinga Nadan v. Raja Rajeswara Dorai*, 35 Ind App 176 (PC) (E), it was held by the Privy Council affirming the judgment of the

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Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. The conclusion is also implicit in Art. 25 which after declaring that all persons are entitled freely to profess, practise and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism. We must accordingly hold that if the rights of the appellants have to be determined solely with reference to Art. 26 (b), then S. 3 of Act V of 1947, should be held to be bad as infringing it.

(19) (4) That brings us on to the main question for determination in this appeal, whether the right guaranteed under Art. 26 (b) is subject to a law protected by Art. 25 (2) (b) throwing the suit temple open to all classes and sections of Hindus. We must now examine closely the terms of the two Articles. Art. 25, omitting what is not material, is as follows:

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law --

.....
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Article 26 runs as follows:

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right--

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

(20) We have held that matters of religion in Art. 26 (b) include the right to exclude persons who are not entitled to participate in the worship according to the tenets of the institution. Under this Article, therefore, the appellants



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would be entitled to exclude all persons other than Gowda Saraswath Brahmins from entering into the temple for worship. Art. 25(b) enacts that a law throwing open public temples to all classes of Hindus is valid. The word 'public' includes, in its ordinary acceptation, any section of the public, and the suit temple would be a public institution within Art. 25 (2) (b), and S. 3 of the Act would therefore be within its protection. Thus, the two Articles appear to be apparently in conflict. Mr. M. K. Nambiar contends that this conflict could be avoided if the expression "religious institutions of a public character" is understood as meaning institutions dedicated to the Hindu community in general, though some sections thereof might be excluded by custom from entering into them, and that, in that view, denominational institutions founded for the benefit of a section of Hindus would fall outside the purview of Art. 25(2)(b) as not being dedicated for the Hindu community in general. He sought support for this contention in the law relating to the entry of excluded classes into Hindu temples and in the history of legislation with reference thereto, in Madras.

(21) According to the Agamas, a public temple enures, where it is not proved to have been founded for the benefit of any particular community, for the benefit of all Hindus including the excluded classes. But the extent to which a person might participate in the worship therein would vary with the community in which he was born. In *Venkatachalapathi v. Subbarayadu*, IIR 13 Mad 293 (F), the following statement of the law was quoted by the learned Judges with apparent approval:

"Temple, of course, is intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. Sudras and Baniyas can go into the hall of the temple. Brahmins can go into the holy of the holies."

In *Gopala Muppanar v. Subramania Aiyar* (D) (supra), Sadasiva Aiyar, J., observed as follows at p. 258 (of Mad LJ): (at p. 366 of A.I.R.).

It is clear from the above that temples were intended for the worship of people belonging to all the four castes without exception. Even out-castes were not wholly left out of the benefits of temple worship, their mode of worship being however made subject to severe restrictions as they could not pass beyond the Dwajastambam (and some times not beyond the temple outer gate) and they could not have a sight of the images other than the procession images brought out at the times of festivals.

(22) The true position, therefore, is that the excluded classes were all entitled to the benefit of the dedication, though their actual participation in the worship was insignificant. It was to remove this anomaly that legislation in Madras was directed for near a decade. . . .

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... One of the problems which had been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchables. A custom which denied to large sections of Hindus the right to use public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic principle, and efforts were being made to secure its abolition by legislation. This culminated in the enactment of Art. 17, which is as follows:

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

(24) Construing Art. 25 (2) (b) in the light of Art. 17, it is arguable that its object was only to permit entry of the excluded classes into temples which were open to all other classes of Hindus, and that that would exclude its application to denominational temples. Now, denominational temples are founded, ex hypothesi, for the benefit of particular sections of Hindus, and so long as the law recognises them as valid--and Art. 26 clearly does that--what reason can there be for permitting entry into them of persons other than those for whose benefit they were founded? If a trustee diverts trust funds for the benefit of persons who are not beneficiaries under the endowment, he would be committing a breach of trust, and though a provision of the Constitution is not open to attack on the ground that it authorises such an act, is it to be lightly inferred that Art. 25 (2) (b) validates what would, but for it, be a breach of trust and for no obvious reasons of policy, as in the case of Art. 17? There is, it should be noted, a fundamental distinction between excluding persons from temples open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation. The former will be hit by Art. 17, and the latter protected by Art. 26, and it is the contention of the appellants that Art. 25 (2) (b) should not be interpreted as applicable to both these categories and that it should be limited to the former. The argument was also advanced as further supporting this view, that while Art. 26 protects denominational institutions of not merely Hindus but of all communities such as Muslims and Christians, Art. 25 (2) (b) is limited in its operation to Hindu temples, and that it could not have been intended that there should be imported into Art. 26 (b) a limitation which would apply to institutions of one community and not of others. Article 26, it was contended, should therefore be construed as falling wholly outside Art. 25 (2) (b), which should be limited to institutions other than denominational ones.



(25) The answer to this contention is that it is impossible to read any such limitation into the language of Art. 25 (2) (b). It applies in terms to all religious institutions of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a priori reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in a Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Art. 25 (2) (b).

(26) It is then said that if the expression "religious institutions of a public character" in Art. 25 (2) (b) is to be interpreted as including denominational institutions, it would clearly be in conflict with Art. 26 (b), and it is argued that in that situation, Art. 26 (b) must, on its true construction, be held to override Art. 25 (2) (b). Three grounds were urged in support of this contention, and they must now be examined. It was firstly argued that while Art. 25 was stated to be "subject to the other provisions of this Part" (Part III), there was no such limitation on the operation of Art. 26, and that, therefore, Art. 26 (b) must be held to prevail over Art. 25 (2) (b). But it has to be noticed that the limitation "subject to the other provisions of this Part" occurs only in Cl. (1) of Art. 25 and not in cl. (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practise and propagate religion. It is this right that is subject to the other provisions in the Fundamental Rights Chapter. One of the provisions to which the right declared in Art. 25 (1) is subject is Art. 25 (2). A law, therefore, which falls within Art. 25 (2) (b) will control the right conferred by Art. 25 (1), and the limitation in Art. 25 (1) does not apply to that law.

(27) It is next contended that while the right conferred under Art. 26 (d) is subject to any law which may be passed with reference thereto, there is no such restriction on the right conferred by Art. 26 (b). . . . It is undoubtedly true that the right conferred under Art. 26 (b) cannot be abridged by any legislation, but the validity of S. 3 of Act V of 1947, does not depend on its own force but on Art. 25 (2) (b) of the Constitution. The very Constitution which is claimed to have rendered S. 3 of the Madras Act void as being repugnant to Art. 26 (b) has, in Art. 25 (2) (b), invested it with validity, and, therefore, the appellants can succeed only by establishing that Art. 25 (2) (b) itself is inoperative as against Art. 26 (b).



(28) And lastly, it is argued that whereas Art. 25 deals with the rights of individuals, Art. 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to that denomination, that would remain unaffected by Art. 25 (2) (b). This contention ignores the true nature of the right conferred by Art. 24 (2) (b). That, is a right conferred on "all classes and sections of Hindus" to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Art. 25 (1) or against a denomination under Art. 26 (b). The fact is that though Art. 25 (1) deals with rights of individuals, Art. 25 (2) is much wider in its contents and has reference to the rights of communities, and controls both Art. 25 (1) and Art. 26 (b).

(29) The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Art. 25 (2) (b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Art. 26 (b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Art. 25 (2) (b) will prevail. While, in the former case, Art. 25 (2) (b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Art. 26 (b). We must accordingly hold that Art. 26 (b) must be read subject to Art. 25 (2) (b).

(30) (5) It remains to deal with the question whether the modifications made in the decree of the High Court in favour of the appellants are valid. Those modifications refer to various ceremonies relating to the worship of the deity at specified times each day and on specified occasions. The evidence of P. W. 1 establishes that on those occasions, all persons other than Gowda Saraswath Brahmins were excluded from participation thereof. That evidence remains uncontradicted, and has been accepted by the learned Judges, and the correctness of their finding on this point has not been challenged before us. It is not in dispute that the modifications aforesaid relate . . . to matters of religion, being intimately connected with the worship of the deity. On the finding that the suit temple is a denominational one, the modifications made in the High Court decree would be within the protection of Art. 26 (b).



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realpatidar.com (31) The learned Solicitor-General for the respondents assails this portion of the decree on two grounds. He firstly contends that the right to enter into a temple which is protected by Art. 25 (2) (b) is a right to enter into it for purposes of worship, that that right should be liberally construed, and that the modifications in question constitute a serious invasion of that right, and should be set aside as unconstitutional. We agree that the right protected by Art. 25 (2) (b) is a right to enter into a temple for purposes of worship, and that further it should be construed liberally in favour of the public. But it does not follow from this that that right is absolute and unlimited in character. No member of the Hindu public could, for example, claim as part of the rights protected by Art. 25 (2) (b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services, which the Archakas alone could perform. It is again a well-known practice of religious institutions of all denominations to limit some of its services to persons who have been specially initiated, though at other times, the public in general are free to participate in the worship. Thus, the right recognised by Art. 25 (2) (b) must necessarily be subject to some limitations or regulations, and one such limitation or regulation must arise in the process of harmonising the right conferred by Art. 25 (2) (b) with that protected by Art. 26 (b).

(32) We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26 (b), must yield to the overriding right declared by Art. 25 (2) (b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Art. 25 (2) (b) overrides that right so as to extinguish it, but whether it is possible--so to regulate the rights of the persons protected by Art. 25 (2) (b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25 (2) (b), then of course, on our conclusion that Art. 25 (2) (b) prevails as against Art. 26 (b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25 (2) (b) as to give effect to Art. 26 (b), and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected.

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(33) The question then is one of fact as to whether the rights claimed by the appellants are strictly denominational in character, and whether after giving effect to them, what is left to the public of the right of worship is substantial. That the rights allowed by the High Court in favour of the appellants are purely denominational clearly appears from the evidence on record. P. W. 1 put forward two distinct rights on behalf of the Gowda Saraswath Brahmins. He firstly claimed that no one except members of his community had at any time the right to worship in the temple except with their permission; but he admitted that the members of the public were, in fact, worshipping and that permission had never been refused. This right will be hit by Art. 25 (2) (b), and cannot be recognised. P. W. 1 put forward another and distinct right, namely, that during certain ceremonies and on special occasions, it was only members of the Gowda Saraswath Brahmin community that had the right to take part therein, and that on those occasions, all other persons would be excluded. This would clearly be a denominational right. Then, the question is whether if this right is recognised, what is left to the public of their right under Art. 25 (2) (b) is substantial. The learned Solicitor-General himself conceded that even apart from the special occasions reserved for the Gowda Saraswath Brahmins, the other occasions of worship were sufficiently numerous and substantial, and we are in agreement with him. On the facts, therefore, it is possible to protect the rights of the appellants on those special occasions, without affecting the substance of the right declared by Art. 25 (2) (b); and, in our judgment, the decree passed by the High Court, strikes a just balance between the rights of the Hindu public under Art. 25 (2) (b), and those of the denomination of the appellants under Art. 26 (b) and is not open to objection.

.....
Appeal dismissed.

NOTE: What characteristics made the Gowda Saraswat Brahmins a religious denomination? Is every caste a religious denomination? If so, are not caste groups protected by all the constitutional guarantees for religious groups? Could it be that some castes are religious denominations, but others not?

What made entry into the temple and participation in services a "matter of religion?" Sacred text? Custom? Community opinion? Some external standard applied by the Supreme Court?

How does the Court reconcile the denomination rights conferred by Art. 26 with the temple-entry power conferred by Art. 25? Does Art. 25 (2) b confer any rights on anyone? What other solutions were available to the Court?

* * * * *

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The following case brings together a number of strands -- the autonomy of the caste group, its powers of excommunication, the protections for religious groups, the state's power to provide for social reform, the definition of religion and the meaning of the ban on "untouchability." The central question is whether the state may forbid a "community" to excommunicate members. Bombay passed such a law in 1949, making excommunication a criminal offense. This was tested before the Bombay High Court (not long after it decided the case of *Narasu Appa Mali*) in a case involving the Dawoodi Bohra community. The High Court upheld the Bombay Act. *Taher Saiffudin v. Tyebbhaji Moosaji*, A.I.R. 1953 Bom. 183. In regard to the rights of religious groups Chagla, C.J., said:

... Now, the question is what exactly is the meaning of the expression "managing its own affairs in matters of religion." Does it mean that the religious denomination can manage its own affairs in such a manner as to deprive a member of that denomination of his legal rights and privileges? Surely, that cannot be the meaning to be given to the language used in the Constitution. To manage its own affairs in matters of religion can only mean that in domestic matters of a religious denomination, where those matters are concerned with questions of religion, the Legislature cannot interfere unless the denomination is managing its affairs in such a way as to interfere with public order, morality and health. But when a religious denomination seeks to deprive a member of his legal rights and privileges, it is doing much more than managing its own affairs. It is interfering with the rights of its members, and the Constitution has not protected a religious denomination and has not given its imprimatur to the acts of a religious denomination which deprives its members of their legal rights and privileges. Further, it does not seem to us that when a religious denomination claims a right to expel or excommunicate a member, it is managing its own affairs in matters of religion. Religion has nothing whatever to do with the right of excommunication or expulsion. As we have said earlier while referring to Art. 25, it is more a question of religious practice than a matter of religious faith or belief, and the distinction between religious practice and religion is sharp and clear. Religion is a matter of a man's faith and belief. It is a matter concerning a man's contact with his creator. It has nothing whatever to do with the manner in which a practice is accepted or adopted as forming part of a particular religion or faith. Therefore, in our opinion, the defendant cannot claim the right conferred upon a religious denomination under Art. 26 to manage its own affairs in matters of religion in order to put forward the claim of excommunicating or expelling its members and thus depriving them of the rights and privileges which attach to the membership of that denomination.

The case was never appealed to the Supreme Court, apparently because of the death of one of the parties. A decade later the Bombay Act was brought before the Supreme Court by the same sect in the following case.



SAIFUDDIN SAHEB v. STATE OF BOMBAY*

A.I.R. 1962 Supreme Court 853

.....
DAS GUPTA, J.: (on behalf of himself, Sarkar and Mudholkar JJ.)

(26) In our opinion this petition should succeed.

(27) The petitioner is the head of the Dawoodi Bohras who form one of the several sub-sects of the Shia sect of Musalmans. Dawoodi Bohras believe that since the 21st Imam went into seclusion, the rights, power and authority of the Imam have been rightfully exercised by the Dai-ul-Mutlaq, as the vice-regent of the Imam in seclusion. One of such rights is the exercise of disciplinary powers including the right to excommunicate any member of the Dawoodi Bohra community. The existence of such a right in the Dai-ul-Mutlaq who is for the sake of convenience often mentioned as the Dai was questioned before the courts in a case which went up to the Privy Council. But since the decision of the Privy Council in that case, viz., 75 Ind App 1: (AIR 1948 PC 66), that question may be taken to have been finally settled, and it is no longer open to dispute that the Dai, as the head of the Dawoodi Bohra community has the right to excommunicate any member of the community. The claim of the present petitioner to be the 51st Dai-ul-Mutlaq of the community was also upheld in that case and is no longer in dispute. The Privy Council had also to consider in that case the question whether this power to excommunicate could be exercised by the Dai in any manner he liked and held after consideration of the previous cases of excommunication and also a document composed about 1200 A.D. that normally members of the community can be expelled "only at a meeting of the Jamat after being given due warning of the fault complained of and an opportunity of amendment and after a public statement of the grounds of expulsion." Speaking about the effects of excommunication their Lordships said:--

"Excommunication . . . necessarily involves exclusion from the exercise of religious rights in places under the trusteeship of the head of the community in which religious exercises are performed." The present petitioner, it may be mentioned, was a party to that litigation.

(28) This decision was given on December 1, 1947; shortly after that, the Bombay Legislature--it may be mentioned that there is a large concentration of Dawoodi Bohras in the State of Bombay--stepped in to prevent as mentioned in

*The opinions are presented here in an order different from that of the original



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the preamble, the practice of excommunication "which results in the deprivation of legitimate rights and privileges of" members of certain religious communities and enacted the Bombay Act No. XLII of 1949.

(29) It is a short Act of six sections. Section 3--the main operative section--invalidates all excommunication of members of any religious community. Excommunication is defined in section 2 to mean "the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of a civil nature by him or on his behalf as such member." The explanation to the definition to this section makes it clear that a right to office or property or to worship in any religious place or a right to burial or cremation is included as a right legally enforceable by suit even though the determination of such right may depend entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community. Section 4 makes a person who does any act which amounts to excommunication or is in furtherance of the excommunication liable to punishment which may extend to one thousand rupees.

(30) Faced with the position that the legislation wholly destroys his right of excommunicating any member of the Dawoodi Bohra community, the Dai has presented this petition under Art. 32 of the Constitution. He contends that the Act violates the fundamental right of the Dawoodi Bohras, including himself, freely to practise religion according to their own faith and practice--a right guaranteed by Art. 25 of the Constitution, and further that it violates the right of the Dawoodi Bohra community to manage its own affairs in matters of religion guaranteed by Art. 26. Therefore, says he, the Act is void and prays for a declaration that the Act is void and the issue of an appropriate writ restraining the respondent, the State of Bombay, its officers, servants and agents from enforcing the provisions of the Act against the petitioner and/or any other member of the Dawoodi Bohra community.

(32) The respondent contends that neither the right guaranteed under Art. 25 nor that under Art. 25(b) is contravened by the impugned Act. Briefly stated, the respondent's case is that the right and privilege of the petitioner as Dai-ul-Mutlaq to regulate the exercise of religious rights do not include the right to excommunicate any person so as to deprive him of his civil rights and privileges. It was denied that the petitioner's power to excommunicate was an essential part of the religion of the Dawoodi Bohra community and that the right has its foundation in religion and religious doctrines, tenets and faith of the Dawoodi Bohra community. It was also denied that the right to excommunicate

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is the religious practice and it was further pleaded that assuming that it was a religious practice, it was certainly not a part of religion of the Dawoodi Bohra community.

.....
[T]he main principles underlying these provisions [Arts. 25 and 26] have by these decisions [Citations omitted] been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

(35) Before however we can give a proper answer to the two questions raised, viz., (i) Has the impugned Act interfered with a right freely to practise religion and (ii) Has it interfered with the right of the Dawoodi Bohra community to manage its own affairs in matters of religion; it is necessary to examine first the place of excommunication in the life of a religious community. Much valuable information about this is furnished by an article in the Encyclopaedia of the Social Sciences from the pen of Prof. Hazeltine. "Excommunication," says Prof. Hazeltine, "in one or another of the several different meanings of the term has always and in all civilizations been one of the principal means of maintaining discipline within religious organizations and hence of preserving and strengthening their solidarity."
Druids in old Britain are said to have claimed the power to exclude offenders from sacrifice. The early Christian Church exercised this power very largely and expelled and excluded from the Christian association, those members who proved to be unworthy of its aims or infringed its rules of governance. During the middle ages the Pope used this power frequently to secure the observance of what was considered the proper religious rights and practices of Christianity by excommunicating even the kings of some European countries when they introduced or tried to introduce different forms of divine worship. The power was often used, not perhaps always fairly and justly, as a weapon in the struggle for the principle that the Church was above the State. Impartial historians have recognised, however, that many of the instances of excommunication were for the purpose of securing the adherence to the orthodox creed and doctrine of Christianity



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as pronounced by the Catholic Church. (Vide The Catholic Encyclopaedia, Vol. V, Articles on England and Excommunication).

(36) Turning to the Canon law we find that excommunication may be inflicted as a punishment for a number of crimes, the most serious of these being heresy, apostasy or schism. Canon 1325, section 2 defines a heretic to be a man who while remaining nominally a Christian, pertinaciously denies or doubts any one of the truths which must be believed *de fide divina et catholica*; if he falls away entirely from the Christian faith, he is an apostate; finally if he rejects the authority of the Supreme Pontiff or refuses communion with the members of the Church who are subject to him, he is a Schismatic. (Vide Canon Law by Bouscaren and Ellis).

(37) Among the Muslims also the right to excommunication appears to have been practised from the earliest times. The Prophet and the Imam, had this right; and it is not disputed that the Dais have also in the past exercised it on a number of occasions. There can be little doubt that heresy or apostasy was a crime for which excommunication was in force among the Dawoodi Bohras also. It may be pointed out in this connection that excommunication in the case of 75 Ind App 1: (AIR 1948 P.C. 66), (which was upheld by the Privy Council) was based on the failure to comply with the tenets and traditions of the Dawoodi Bohra community and certain other faults.

(38) According to the petitioner it is "an integral part of the religion and religious faith and belief of the Dawoodi Bohra community" that excommunication should be pronounced by him in suitable cases. It was urged that even if this right to excommunicate is considered to be a religious practice as distinct from religious faith such religious practice is also a part of the religion of the Dawoodi Bohra community. It does appear to be a fact that unquestioning faith in the Dai as the head of the community is part of the creed of the Dawoodi Bohras. It is unnecessary to trace the historical reasons for this extraordinary position of the Dai as it does not appear to be seriously disputed that the Dai is considered to be the vice-regent of the Imam so long as the rightful Imam continues in seclusion.

(39) Mention must be made in this connection of the *Mishak* which every Dawoodi Bohra takes at the time of his initiation. This includes, among other things, an oath of unquestioning faith in and loyalty to the Dai. It is urged therefore that faith in the existence of the disciplinary power of the Dai including his power to excommunicate forms one of the religious tenets of this community.

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The argument that Art. 25 has been contravened by the impugned Act is based mainly on this contention and the further contention that in any case excommunication is a religious practice in this community. As regards Art. 26 (b) the argument is that excommunication among the Dawoodi Bohras forms such an integral part of the management of the community by the religious head that interference with that right cannot but amount to an interference with the right of the community to manage its own affairs in matters of religion.

(40) Let us consider first whether the impugned Act contravenes the provisions of Art. 26(b). It is unnecessary for the purpose of the present case to enter into the difficult question whether every case of excommunication by the Dai on whatever grounds inflicted is a matter of religion. What appears however to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism under the Canon Law) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community through its religious head "of its own affairs in matters of religion." The impugned Act makes even such excommunications invalid and takes away the power of the Dai as the head of the community to excommunicate even on religious grounds. It, therefore, clearly interferes with the right of the Dawoodi Bohra community under cl. (b) of Art. 26 of the Constitution.

(41) That excommunication of a member of a community will affect many of his civil rights is undoubtedly true. This particular religious denomination is possessed of properties and the necessary consequence of excommunication will be that the excommunicated member will lose his rights of enjoyment of such property. It might be thought undesirable that the head of a religious community would have the power to take away in this manner the civil rights of any person. The right given under Art. 26 (b) has not however been made subject to preservation of civil rights. The express limitation in Art. 26 itself is that this right under the several clauses of the article will exist subject to public order, morality and health. It has been held by this Court in [Sri Venkataramana Devaru v. State of Mysore] 1958 SCR 895: (A.I.R. 1958 SC 255) that the right under Art. 26(b) is subject further to Cl. 2 of Art. 25 of the Constitution.



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(42) We shall presently consider whether these limitations on the rights of a religious community to manage its own affairs in matters of religion can come to the help of the impugned Act. It is clear however that apart from these limitations the Constitution has not imposed any limit on the right of a religious community to manage its own affairs in matters of religion. The fact that civil rights of a person is affected by the exercise of this fundamental right under Art. 26(b) is therefore of no consequence. Nor is it possible to say that excommunication is prejudicial to public order, morality and health.

(43) Though there was a statement in paragraph 10 of the respondent's counter affidavit that "the religious practice, which runs counter to the public order, morality and health must give way before the good of the people of the State," the learned Attorney-General did not advance any argument in support of this plea.

(44) It remains to consider whether the impugned Act comes within the saving provisions embodied in Cl. 2 of Art. 25. The clause is in these words:

Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law--

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institution of a public character to all classes and sections of Hindus.

Quite clearly, the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. Indeed, that was not even suggested on behalf of the respondent State. It has faintly suggested however that the Act should be considered to be a law "providing for social welfare and reform." The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and that the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform." The barring of excommunication on grounds other than religious grounds, say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of Cl. 2(b) of Art. 25. But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the

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law in so far as it invalidates excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law in so far as it invalidates excommunication on religious grounds and takes away the Dai's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. As the Act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community under Art. 26(b) of the Constitution.

(45) It is unnecessary to consider the other attack on the basis of Art. 25 of the Constitution.

(46) Our conclusion is that the Act is void being in violation of Art. 26 of the Constitution. The contrary view taken by the Bombay High Court in *Taher Saifuddin v. Tyebkhani Moosaji*, AIR 1953 Bom 183 is not correct.

(47) We would, therefore, allow the petition, declare the Act to be void and direct the issue of a writ in the nature of mandamus on the respondent, the State of Bombay, not to enforce the provisions of the Act. The petitioner will get his costs.

AYYANGAR, J.: [Concurring]

(48) I agree that the petition should succeed and I generally concur in the reasoning of Das Gupta J. by which he has reached this conclusion. In view however, of the importance of the case I consider it proper to state in my own words the grounds for my concurrence.

.....
... [T]hese articles [25 and 26] embody the principle of religious toleration that has been the characteristic feature of Indian civilization from the start of history, the instances and periods when this feature was absent being merely temporary aberrations. Besides, they serve to emphasize the secular nature of Indian Democracy which the founding fathers considered should be the very basis of the Constitution.

.....
(52) The question to consider is whether a law which penalises excommunication by a religious denomination or by its head whether or not the excommunication be for non-conformity to the basic essentials of the religion of that denomination effects the nullification of such excommunication as regards the rights of the person excommunicated would or would not infringe the rights guaranteed by Arts. 25 and 26.



.....

(54) Here is a religious denomination within Art. 26. The Dai-ul-Mutlaq is its spiritual leader, the religious head of the denomination and in accordance with the tenets of that denomination he had invested in him the power to excommunicate dissidents. Pausing here, it is necessary to examine the rational basis of the excommunication of persons who dissent from the fundamental tenets of a faith. The identity of a religious denomination consists in the identity of its doctrines, creeds and tenets and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union which binds them together as one community. . . . A denomination within Art. 26 and persons who are members of that denomination are under Art. 25 entitled to ensure the continuity of the denomination and such continuity is possible only by maintaining the bond of religious discipline which would secure the continued adherence of its members to certain essentials like faith, doctrine, tenets and practices. The right to such continued existence involves the right to maintain discipline by taking suitable action inter alia of excommunicating those who deny the fundamental bases of the religion. The consequences of the exercise of that power vested in the denomination or in its head—a power which is essential for maintaining the existence and unity of the denomination must necessarily be the exclusion of the person excommunicated from participation in the religious life of the denomination, which would include the use of places of worship or of consecrated places for burial dedicated for the use of the members of the denomination and which are vested in the religious head as a trustee for the denomination.

.....

. . . [I]t appears to me that the consequence of the deprivation of the use of these properties [places of worship and burial grounds] by persons excommunicated would be logical and would flow from the order of excommunication. It could not be contested that the consequence of a valid order of excommunication was that the person excommunicated would cease to be entitled to the benefits of the trusts created or founded for the denomination or to the beneficial use or enjoyment of denominational property. If the property belongs to a community and if a person by excommunication ceased to be a member of that community it is a little difficult to see how his right to the enjoyment of the denominational property could be divorced from the religious practice which resulted in his ceasing to be a member of the community. When once it is conceded that the right guaranteed by Art. 25(1) is not confined to freedom of conscience in the



sense of the right to hold a belief and to propagate that belief, but includes the right to the practice of religion, the consequences of that practice must also bear the same complexion and be the subject of a like guarantee.

. . . [I]t is not as if the impugned enactment saves only the civil consequences of an excommunication not interfering with the other consequences of an excommunication falling within the definition. . . . The learned Attorney-General is therefore not right in the submission that the Act is concerned only with the civil rights of the excommunicated person. On the other hand, it would be correct to say that the Act is concerned with excommunications which might have religious significance but which also operate to deprive persons of their civil rights.

(58) Article 26 confers on every religious denomination two rights which are relevant in the present context, by cl. (b)--"to manage its own affairs in matters of religion"--and by the last clause--cl. (d)--"to administer such property" which the denomination owns or has acquired (vide cl. (c) "in accordance with law." In considering the scope of Art. 26 one has to bear in mind two basic postulates: First that a religious denomination is possessed of property which is dedicated for definite uses and which under Art. 26(d) the religious denomination has the right to administer. From this it would follow that subject to any law grounded on public order, morality or health the limitations with which Art. 26 opens, the denomination has a right to have the property used for the purposes for which it was dedicated. So far as the present case is concerned, the management of the property and the right and the duty to ensure the proper application of that property is admittedly vested in the Dai as the religious head of the denomination. Article 26 (d) speaks of the administration of the property being in accordance with law and the learned Attorney-General suggested that a valid law could be enacted which would permit the diversion of those funds to purposes which the legislature in its wisdom thought it fit to appropriate. I feel wholly unable to accept this argument. A law which provides for or permits the diversion of the property for the use of persons who have been excluded from the denomination would not be "a law" contemplated by Art. 26(d). Leaving aside for the moment the right of excommunicated persons to the enjoyment of property dedicated for the use of a denomination, let me take the case of a person who has renounced that religion, and in passing it might be observed that even in cases of an apostate according to the principles governing the Dawoodi Bohra denomination there is no ipso facto loss of rights, only apostasy is a ground for excommunication which however could take place without service of notice or an enquiry. It could not be contended that an apostate would be



entitled to the beneficial use of property, dedicated to the Dawoodi Bohra community be it the mosque where worship goes on or other types of property like consecrated burial grounds etc. It would be obvious that if the Dai permitted the use of the property by an apostate without excommunicating him he would be committing a dereliction of his duty as the supreme head of the religion--in fact an act of sacrilege besides being guilty of a breach of trust. I consider that it hardly needs any argument to show that if a law permitted or enjoined the use of the property belonging to the denomination by an apostate it would be a wholly unauthorised diversion which would be a violation of Art. 26 (d) and also of Art. 26 (c), not to speak of Art. 25 (1). The other postulate is the position of the Dai as the head of the religious denomination and as the medium through which spiritual grace is brought to the community and that this is the central part of the religion as well as one of the principal articles of that faith. Any denial of this position is virtually tantamount to a denial of the very foundation of the faith of the religious denomination.

(59) The attack on the constitutionality of the Act has to be judged on the basis of these two fundamental points. The practice of excommunication is of ancient origin. . . .

. . . [E]xcommunication might bear two aspects: (1) as a punishment for crimes which the religious community justifies putting one out of its fold. In this connection it may be pointed out that in a theocratic State the punitive aspect of excommunication might get emphasized and might almost take the form of a general administration by religious dignitaries of ordinary civil law. But there is another aspect which is of real relevance to the point now under consideration. From this point of view excommunication might be defined as the judicial exclusion from the right and privileges of the religious community to whom the offender belongs. Here it is not so much as a punishment that excommunication is inflicted but is used as a measure of discipline for the maintenance of the integrity of the community, for in the ultimate analysis the binding force which holds together a religious community and imparts to it a unity which makes it a denomination is a common faith, common belief and a belief in a common creed, doctrines and dogma. A community has a right to insist that those who claim to be within its fold are those who believe in the essentials of its creed and that one who asserts that he is a member of the denomination does not, at least, openly denounce the essentials of the creed, for if everyone were at liberty to deny these essentials, the community as a group would soon cease to exist. It



is in this sense that it is a matter of the very life of a denomination that it exercises discipline over its members for the purpose of preserving unity of faith, at least so far as the basic creed or doctrines are concerned. The impugned enactment by depriving the head of the power and the right to excommunicate and penalising the exercise of the power, strikes at the very life of the community by rendering it impotent to protect itself against dissidents and schismatics. It is thus a violation of the right to practise religion guaranteed by Art. 25(1) and is also violative of Art. 26 in that it interferes with the rights of the Dai as the trustee of the property of the denomination to so administer it as to exclude dissidents and excommunicated persons from the beneficial use of such property.

(61) It is admitted however in the present case that the Dai as the head of the denomination has vested in him the power, subject to the procedural requirements indicated in the judgment of the Privy Council, to excommunicate such of the members of the community as do not adhere to the basic essentials of the faith and in particular those who repudiate him as the head of the denomination and as a medium through which the community derives spiritual satisfaction or efficiency mediately from the God-head. It might be that if the enactment had confined itself to dealing with excommunication as a punishment for secular offences merely and not as an instrument for the self preservation of a religious denomination the position would have been different and in such an event the question as to whether Arts. 25 and 26 would be sufficient to render such legislation unconstitutional might require serious consideration. That is not the position here. The Act is not confined in its operation to the eventualities just now mentioned but even excommunication with a view to the preservation of the identity of the community and to prevent what might be a schism in the denomination is also brought within the mischief of the enactment. It is not possible, in the definition of excommunication which the Act carries, to read down the Act so as to confine excommunication as a punishment of offences which are unrelated to the practice of the religion which do not touch and concern the very existence of the faith of the denomination as such. Such an exclusion cannot be achieved except by rewriting the section.

(62) (3) The next question is whether the impugned enactment could be sustained as a measure of social welfare and reform under Art. 25(2)(b). The learned Attorney-General is, no doubt, right in his submission that on the decision of this Court in the Mulki Temple case--1958 SCR 895 : (AIR 1958 SC255), the right guaranteed under Art. 26(b) is subject to a law protected by Art. 25(2)(b).



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The question then before the Court related to the validity of a law which threw open all public temples, even those belonging to "a religious denomination" to "every community of Hindus including 'untouchables'" and it was held that, notwithstanding that the exclusion of these communities from worship in such a temple was an essential part of the "practice of religion" of the denomination, the constitutionality of the law was saved by the second part of the provision in Art. 25(2)(b) reading: "the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." The learned Attorney-General sought support from this ruling for the proposition that Art. 25(2)(b) could be invoked to protect the validity of a law which was "a measure of social welfare and reform" notwithstanding that it involved an abrogation of the whole or part of the essentials of a religious belief or of a religious practice. I feel unable to accept the deduction as flowing from the Mulki Temple case. That decision proceeded on two bases: (1) As regards the position of "untouchables," Art. 17 had made express provision stating:

'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.

and that had to be recognised as a limitation on the rights of religious denominations however basic and essential the practice of the exclusion of untouchables might be in its tenets or creed. (2) There was a special saving as regards laws providing for "throwing open of public Hindu Religious Institutions to all classes and sections of Hindus" in Art. 25(2) (b), and effect had to be given to the wide language in which this provision was couched. In the fact of the language used, no distinction could be drawn between beliefs that were basic to a religion, or religious practices that were considered to be essential by a religious sect, on the one hand, and on the other beliefs and practices that did not form the core of a religion or of the practices of that religion. The phraseology employed cut across and effaced these distinctions.

(63) But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform." To start with, it has to be admitted that this phrase is, as contrasted with the second portion of Art. 25(2)(b), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Art. 25(1) and the saving would cover beliefs and practices even though considered essential

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or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Art. 25(1) for two reasons: (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom--a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform." (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Art. 25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform.

(64) In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislation to "reform" a religion out of existence or identity. Article 25(2)(a) having provided for legislation dealing with "economic, financial, political or secular activity which may be associated with religious practices," the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are associated with religion. Just as the activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Art. 25(2)(b) is not intended to cover the basic essentials of the creed of a religion which is protected by Art. 25(1).

(65) Coming back to the facts of the present petition, the position of the Dai-ul-Muflaq, is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his ministration is one of the bonds that hold the community together as a unit. The power of excommunication is vested in him for the purpose of enforcing discipline and keep the denomination together as an entity. The purity of the fellowship is secured by the removal of persons who had rendered themselves unfit and unsuitable for membership of the sect. The power of excommunication for the purpose of ensuring the preservation of the community, has therefore a prime significance in the religious life of every member of the group. A legislation which penalises this power even when exercised for the purpose above-indicated cannot be sustained as a measure of social welfare or social reform without eviscerating the guarantee under Art. 25(1) and rendering the protection illusory.

(66) In my view the petitioner is entitled to the relief that he seeks and the petition will accordingly be allowed.



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.....
SINHA, C. J. [Dissenting]
.....

... [T]he Act is a culmination of the history of social reform which began more than a century ago with the enactment of S. 9 of Regulation VII of 1832 of the Bengal Code, which provided, inter alia that the laws of Hindus and Muslims shall not be permitted to operate to deprive the parties of any property to which, but for the operation of such laws, they would have been entitled. Those provisions were subsequently incorporated in the India Act (XXI of 1850--known as the Caste Disabilities Removal Act--which provided that a person shall not be deprived of his rights or property by reason of his or her renouncing or exclusion from the communion of any religion or being deprived of caste, and that any such forfeiture shall not be enforced as the law in the Courts. The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others. The legislature had to take the logical final step of creating a new offence by laying down that nobody had the right to deprive others of their civil rights simply because the latter did not conform to a particular pattern of conduct. The Act, in substance, has added a new offence to the penal law of the country by penalising any action which has the effect of depriving a person of his human dignity and rights appurtenant thereto. . . .

.....
... Art. 26, in no uncertain terms, has guaranteed the right to every religious denomination or a section thereof "to manage its own affairs in matters of religion" (Art. 26(b)). Now what are matters of religion and what are not is not an easy question to decide. It must vary in each individual case according to the tenets of the religious denomination concerned. The expression "matters of religion" in Art. 26(b) and "activities associated with religious practice" do not cover exactly the same ground. What are exactly matters of religion are completely outside State interference, subject of course to public order, morality and health. But activities associated with religious practices may have many ramifications and varieties--economic, financial, political and other as recognised by Art. 25(2)(a). Such activities, as are contemplated by the clause aforesaid cover a field much wider than that covered by either Art. 25(1) or

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or Art. 26 (b). Those provisions have therefore to be so construed as to create no conflict between them. We have, therefore, to classify practices into such as are essentially and purely of a religious character, and those which are not essentially such. But it has been contended on behalf of the petitioner that it is for the religious denomination itself to determine what are essentially religious practices and what are not. . . .Art. 26(b) itself would seem to indicate that a religious denomination has to deal not only with matters of religion, but other matters connected with religion, like laying down rules and regulations for the conduct of its members and the penalties attached to infringement of those rules, managing property owned and possessed by the religious community, etc., etc. We have, therefore, to draw a line of demarcation between practices consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion. . . .

. . . [T]he Dai-ul-Mutlaq is not only the head of the religious community but also the trustee of the property of the community in which the community as a whole is interested. Even a theological head has got to perform acts which are not wholly religious but may be said to be quasi-religious or matters which are connected with religious practices, though not purely religious. Actions of the Dai-ul-Mutlaq in the purely religious aspect are not a concern of the courts, but his actions touching the civil rights of the members of the community are justiciable and not outside the pale of interference by the legislature or the judiciary. I am not called upon to decide, nor am I competent to do so, as to what are the religious matters in which the Dai-ul-Mutlaq functions according to his religious sense. . . .

. . . . I am only concerned with the civil rights of the members of the community, which rights they will continue to enjoy as such members if excommunication was held to be invalid in accordance with the provision of the Act. Hence, though the Act may have its repercussions on the religious aspect of excommunication, in so far as it protects the civil rights of the members of the community it has not gone beyond the provisions of Art. 25(2)(b) of the Constitution.

(23) It has further been contended that a person who has been excommunicated as a result of his non-conformity to religious practices is not entitled to use the communal mosque or the communal burial ground or other communal property, thus showing that for all practical purposes he was no more to be treated as a

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member of the community, and is thus an outcast. Another result of excommunication is that no other member of the community can have any contacts, social or religious, with the person who has been excommunicated. All that is true. But the Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his right to follow the dictates of his own conscience. The Act is, thus, aimed at fulfilment of the individual liberty of conscience guaranteed by Art. 25(1) of the Constitution, and not in derogation of it. In so far as the Act has any repercussions on the right of the petitioner, as trustee of communal property, to deal with such property, the Act could come under the protection of Art. 26(d), in the sense that his right to administer the property is not questioned, but he has to administer the property in accordance with law. The law, in the present instance, tells the petitioner not to withhold the civil rights of a member of the community to a communal property. But as against this it is argued on behalf of the petitioner that his right to excommunicate is so bound up with religion that it is protected by cl. (b) of Art. 26, and is thus completely out of the regulation of law, in accordance with the provisions of cl. (d) of that Article. But I am not satisfied on the pleadings and on the evidence placed before us that the right of excommunication is a purely religious matter. . . .

(24) On the social aspect of excommunication, one is inclined to think that the position of an excommunicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practices to be void has only carried out the strict injunction of Art. 17 of the Constitution, by which untouchability has been abolished and its practice in any form forbidden. The Article further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The Act, in this sense, is its logical corollary and must, therefore, be upheld.

(25) In my opinion it has not been established that the Act has been passed by a legislature which was not competent to legislate on the subject, or that it infringes any of the provisions of the Constitution. This petition must, therefore, fail.

.....

ORDER

(67) In accordance with the majority view of this Court, the petition is allowed. The petitioner is entitled to his costs.

Petition allowed.

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NOTE: Which groups in India enjoy a constitutionally protected right of excommunication? All excommunications or only those with certain purposes? Should the excommunication of Biswambar by the Telis (in the Panduram Sahu case) now be thought of as constitutionally protected? Is the doctrine of "caste autonomy" (seen in the cases in Part II as part of the government's policy of non-interferences) now incorporated in the Constitution's Fundamental Rights?

The Untouchability Offences Act, Sec. 7 (2) provides:

Whoever . . . takes any part in the ex-communication of [a person belonging to his community] . . . on the ground that such person has refused to practice 'untouchability' . . . shall be punishable with imprisonment which may extend to six months, or with fines which may extend to five hundred rupees, or with both.

Is this provision constitutional? What possible constitutional infirmities do you see in this provision? Is the excommunication described here one that falls outside the scope of the Saiffudin case.

Does the Devaru case offer a way of reconciling state power and denominational rights in such cases?

* * * * *



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REV. SIDHRAJBHAI SABBAI AND OTHERS v.

STATE OF GUJARAT

A.I.R. 1963 Supreme Court 540

30 August 1962

.....
The following Judgment of the Court was delivered by

J. C. SHAH, J.: [also: B. P. Sinha, C. J.; S. J. Imam; K. Subba Rao; K. N. Wanchoo; J. C. Shah, and N. Rajagopala Ayyangar JJ.]

The petitioners profess the Christian faith and belong to the United Church of Northern India. They are members of the Gujarat and Kathiawar Presbyterian Joint Board--hereinafter called 'the society'--which conducts in the areas which now form the State of Gujarat, forty-two primary schools and a Training College for teachers, known as the "Mary Brown Memorial Training College," at Borsad, District Kaira. The teachers trained in the college are absorbed in the primary schools conducted by the society and those not so absorbed are employed by other Christian Mission Schools conducted by the United Church of Northern India. The cost of maintaining the Training College and the primary schools is met out of donations received from the Irish Presbyterian Mission, fee from scholars and grant-in-aid under the Education Code of the State Government. The primary schools and the College are conducted for the benefit of the religious denomination of the United Church of Northern India and Indian Christians generally, though, admission is not denied to students belonging to other communities. The training course in the college is of the duration of two years and originally 25 students were admitted in the First Year and 25 in the Second Year. Till the year 1952 surplus accommodation after admitting students who were to qualify as teachers required for the society's primary schools, was available for other students. The College was recognized by the Government of Bombay for training students for the examination held by the Education Department for granting certificates for trained teachers.

[The Court then recounts the attempts of the State Government, starting in 1952, to have a percentage of seats in private teacher-training colleges reserved for candidates nominated by the Government. In 1955, the State specified that 80% of the seats should be reserved for District and Municipal School Board Teachers nominated by the Government. Upon the refusal of the College to comply, the Government threatened to withdraw the Grant-in-aid paid to the College. It later carried out this threat. Upon further refusal by the College, the Government threatened to withdraw recognition (accreditation) of the College. The Government's action was taken under the authority of the following rules:

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Rules for Primary Training Colleges

Sec. 5 (2) of these rules prescribed that in non-Governmental institutions, percentages of seats reserved for Board-deputed teachers shall be fixed by the Government and the remaining seats shall be filled by students chosen by the College itself.

Rules for the Recognition of Private Training Institutions

11. The Institution will have to be kept open for all students irrespective of caste or creed. It will be open to Government to reserve seats for Board deputed teachers to such extent as is deemed necessary. The institution will have to give such representation on its staff and students to Backward classes as may be fixed by Government.

12. Women teachers will be admitted in Women's Training Institutions. The Head of such Institutions should be a woman and not less than 50 per cent of the Assistant Teachers, should be women. In special cases, men's institutions may be allowed to admit women teachers provided:

- i) Separate classes for women are formed.
- ii) One trained graduate woman teacher is appointed per class for women teachers opened in the college.
- iii) Separate residential arrangements under supervision of a woman teacher are made for women students in the Hostel.
- iv) Satisfactory arrangements are made for teaching Home Science as an auxiliary craft to women students.
- v) Separate sanitary arrangements are made for women teachers in the college and hostel premises.

14. It will be open to the Department to withdraw recognition or refuse payment of grant to any private training institution for non-fulfilment of any of the conditions mentioned above, for inefficient management and poor quality of teaching, or for failure to comply with any of the Departmental regulation now in force or that may be issued from time to time by the Government or by the Director of Education on behalf of Government.]

.....

(4) The petitioners moved this Court for a writ in the nature of mandamus or other writ directing the State of Bombay and the Director of Education not to compel the society and the petitioners to reserve 80) of any seats in the Training College for "the Government nominated teachers" nor to compel the society and the petitioners to comply with the provisions of Rr. 5 (2), 11, 12 and 14 and not to withdraw recognition of the College or withhold grant in aid under R. 14 or otherwise.

(5) The petitioners are members of a religious denomination and constitute a religious minority. The Society of which they are members maintains educational institutions primarily for the benefit of the Christian community, but admission



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is not denied to students professing other faiths. They maintain a college for training women teachers required for their primary schools. The petitioners claim that their fundamental rights guaranteed by Arts. 30(1), 26(a), (b) (c) and (d) and 19(1) (f) and (g) are violated by letters dated May 28, 1955, December 27, 1955 and March 29, 1956 threatening to withhold the grant-in-aid and to withdraw recognition of the College.

(6) It is common ground that the Government of Bombay makes under the Education Code a grant of Rs. 8,000/- annually to the college. This Code is not framed under any Statute but consists of a series of administrative directions issued by the Government of Bombay pertaining to matters educational and sets out regulations for making grants. The Government also holds examinations for granting certificates to successful candidates as trained primary teachers and scholars receiving training in recognised institutions alone are entitled to appear at the examination. Manifestly, in the absence of recognition by the Government, training in the college will have little practical utility. The college is a non-profit making institution and depends primarily upon donations and Government grant for meeting its expenses. Without such grant it would be extremely difficult if not impossible for the institution to function.

.....
(9) Serious inroads are made by the Rules and Orders issued by the Government of Bombay upon the right vested in the society to administer the training College. By R. 5(2) of the Rules for Primary Training Colleges, the Government is authorised to reserve in "non-Governmental institutions" a percentage of seats "for the Board deputed teachers" and the Management of the institution has the right to admit students only for unreserved seats. By R. 11 of the Rules for recognition of the Private Primary Institutions, authority is again assumed by the Government to reserve seats "for Board deputed teachers." By R. 14, the Education Department is authorised to withdraw recognition and to refuse to pay grant to any private institution for non-fulfilment of the conditions set out in the Rules, for inefficient management and poor quality of teaching or failure to comply with the regulations in force or that may be issued from time to time by the Government or by the Director of Education on behalf of Government. It is manifest that the right of the Private Training Colleges to admit students of their own choice is severely restricted and enforcement of the restrictions is sought to be secured by holding out a threat to withdraw recognition and to refuse to pay grant.

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(10) Article 30(1) provides that all minorities have the right to establish and administer educational institutions of their choice, and Art. 30(2) enjoins the State, in granting aid to educational institutions, not to discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. Clause (2) is only a phase of the non-discrimination clause of the Constitution and does not derogate from the provisions made in clause (1). The clause is moulded in terms negative: the State is thereby enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institution is in the hands of a minority, religious or linguistic, but the form is not susceptible of the inference that the State is competent otherwise to discriminate so as to impose restrictions upon the substance of the right to establish and administer educational institutions by minorities, religious or linguistic. Unlike Art. 19, the fundamental freedom under clause (1) of Art. 30, is absolute in terms: it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Art. 19 may be subjected to. All minorities, linguistic or religious have by Art. 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Art. 30(1) would to that extent be void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right. The fundamental freedom is to establish and to administer educational institutions: it is a right to establish and administer what are in truth educational institutions--institutions which cater to the educational needs of the citizens, or sections thereof. Regulation made in the true interests of efficiency of instruction discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institutions, in matters educational.

(11) The petitioners do not contend that the absolute terms in which the Art. 30(1) is enunciated deprive the State, especially when it pays grant and affords recognition to it as an educational institution competent to train students for the examinations held by the State, to impose reasonable regulations. But it is contended that these regulations can only be in the interest of the institution--regulations to make it an effective educational institution so as to secure excellence of the training imparted therein--the regulations cannot be made in the interest of outsiders. Counsel for the State of Gujarat (upon which State the duty to defend this petition has since the constitution of the new



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State of Gujarat, devolved) contended that the right extends to all such regulations as may appear to the Government in the national or public interest, provided that the regulations do not tend to destroy the character of the institution as one maintained by the minority. Counsel submits that the State is not bound to make a grant, nor is it bound to recognise the minority institution for examinations held by the State; if the State makes a grant or gives recognition to an institution for the examination held by it, the State is entitled to impose conditions relating to admission of students and to withhold grant and recognition, in the event of the institution failing to carry out the conditions, such regulation being in the national or public interest. Counsel concedes that if the effect of the restrictions is the total destruction of the character of the institution as an institution administered by a minority, the restrictions may be regarded as infringing Art. 30(1) but not otherwise. In support of his argument reliance is placed upon the affidavit of Dr. D. V. Chickermane who affirmed that the number of Primary and Basic Schools in the State run by District School or Municipal Boards and others was great, primary schools alone being over 8,900 and the untrained personnel in all the primary schools was about 40,000 which had to be progressively reduced in the interests of the public. It was therefore necessary for the Government and the private Colleges receiving grant-in-aid from Government to prepare qualified teachers for these schools in large numbers and if the private Training Colleges did not train teachers for the School Boards, it would not be possible for such colleges to absorb all the teachers trained by them in their own schools and the training given to extra teachers would be wasted. Dr. Chickermane further affirmed that in 1955 the Government had decided to step up the programme of training teachers in the Boards Schools for training 2,000 teachers every year, the intention being to remove the untrained element in primary schools in the State as early as possible, and that with this object the Government had decided to depute 1,600 teachers to private Training Colleges and this could be possible only if 80% seats in the private Training Colleges would be reserved for such nominees.

(12) The truth of these statements made in Dr. Chickermane's affidavit is not denied by the petitioners. They however submit that the requirement of the State Government of a large number of trained teachers in the near future is not a ground on which the infringement of the fundamental right of the society under Art. 30(1) to administer its educational institution could be justified.

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(13) Restrictions imposed by the Rules and the directions issued upon the right of the society to administer Training College maintained by it, are manifestly not conceived in the interests of the College. The Additional Solicitor General appearing on behalf of the State contends that this Court has held in the Kerala Education Bill 1957, In re, 1959 SCR 995: (AIR 1958 SC 956) that the State may validly impose restrictive measures in the national or the public interest on the right of a minority to administer its educational institution notwithstanding the protection of Art. 30(1), provided such measures are not annihilative of the character of the minority educational institutions. The Kerala Education Bill case, 1959 SCR 995: (AIR 1958 SC 956) arose out of a reference made by the President under Art. 143 of the Constitution, and this Court was called upon to report amongst others on the question whether sub-cl. 5 of Cl. 3 sub-cl. (3) of Cl. 8 and Cls. 9 to 13 of the Bill or any provisions thereof, offended cl. (1) of Art. 30 of the Constitution. By the impugned clauses of the Bill establishment of a new school or the opening of a higher class in any private school could be made only in accordance with the provisions of the Act and the rules made thereunder, and any school or higher class established or opened otherwise than in accordance with such provisions was not to be entitled to recognition by the Government (Cl. 3(5); all fees collected from the students in an aided school were notwithstanding anything contained in any agreement, scheme or arrangement to be made over to the Government (Cl. 8(3); and the salary of the teachers in aided school was to be paid by the Government (Cl.9); the Government was authorised to prescribe qualifications of teachers in private schools, and the Public Service Commission was authorised to frame a list of teachers for appointment in aided schools (Cls. 10 and 11); the conditions of service relating to scales of pay, pension, provident fund, insurance and age of retirement applicable to teachers of Government schools were to apply to teachers of aided schools, and the Managers of aided schools were without the previous sanction of the Government prohibited from dismissing, removing or reducing in rank or suspending any teachers, and subject to the provisions so enacted the conditions of service of teachers of aided schools were to be such as may be prescribed (Cl. 12): the Government was authorised to take over any aided school if it appeared that the management thereof had neglected to perform the duties imposed by or under the Act or the rules made thereunder, or if the Government was satisfied, that was necessary to do so for standardising general education in the State or for improving the level of literacy in any area or



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for more effectively managing the aided educational institutions in any area or for bringing education of any category under their direct control. The schools were thenceforth to vest in the Government absolutely (Cls. 14 and 15). By the provisions of the Bill the power to administer an educational institution was practically taken away from the management. Managers of certain minority schools urged before the Court in that case that the protection of Art. 30(1) to minority educational institutions was in terms absolute, and the State could not competently impose any restrictions upon the exercise of the right of administration or management. On behalf of the State of Kerala it was submitted that by Art. 30(1) the minorities were merely invested with the fundamental right to establish and administer educational institutions of their choice, and that right could be exercised by them so long as they cared to do so on their own resources: fundamental right guaranteed by Art. 30(1) did not extend to getting assistance from the coffers of the State; and if the minority institutions desired to obtain aid from the State they must submit to the terms on which the State offered aid to all other institutions established by other persons.

(14) The Court rejected the extreme contentions advanced by the managers of the educational institutions and by the State, and observed that the right to administer did not include a right to maladminister, and the minority could not ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers possessing any semblance of qualification, and which did not maintain even a fair standard of teaching or which taught matters subversive of the welfare of the scholars. The constitutional right to administer an educational institution of their choice, it was observed, does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of institutions to be aided, but the State could not grant aid in such a manner as to take away fundamental right of the minority community under Art. 30(1). It was pointed out that under the Directive Principles of State Policy, under Arts. 41 to 46 it was the duty of the State to aid educational institutions and to promote the educational interests of minorities and weaker sections of the people. Again, in the circumstances prevailing in the country, no educational institution could, in actual practice, be maintained without aid from the State and if it could not get it unless it surrendered its rights, it would, because of pressure of financial necessities, be compelled to give up its rights under Art. 30(1). The State could not disregard or override the fundamental right by employing indirect methods of achieving

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exactly the same result. Even the legislature could not do indirectly what it certainly could not do directly, and the effect of the application of some of those provisions of the Bill was substantially to override the provisions of Art. 30(1). The Court then entered upon an examination of Cls. 9, 10, 11, 12, and 13 and observed that they constituted serious inroads on the right of administration and appeared "perilously near violating that right", but considering that those provisions were applicable to all educational institutions and that the impugned parts of Cls. 9, 11 and 12 were designed to give protection and security to the ill-paid teachers who were engaged in rendering service to the nation and to protect the backward classes, the Court was prepared to treat Cls. 9, 11 (2) and 12(4) as permissible regulations which the State might impose on the minorities as a condition for granting aid to their educational institutions. But, it was observed, the clauses which authorised the taking over of management, and vested the schools absolutely in the Government, purported, in effect, to annihilate the educational institutions of their choice could not be sustained under Art. 30(1). It was therefore held that notwithstanding the absolute terms in which the fundamental freedom under Art. 30(1) was guaranteed, it was open to the State by legislation or by executive direction to impose reasonable regulations. The Court did not, however, lay down any test of reasonableness of the regulation. The Court did not decide that public or national interest was the sole measure or test of reasonableness: it also did not decide that a regulation would be deemed unreasonable only if it was totally destructive of the right of the minority to administer the educational institution. No general principle on which reasonableness or otherwise of a regulation may be tested was sought to be laid down by the Court. 1959 SCR 995; (AIR 1958 SC 956), therefore, is not an authority for the proposition submitted by the Additional Solicitor General that all regulative measures which are not destructive or annihilative of the character of the institution established by the minority, provided the regulations are in the national or public interest, are valid.

(15) The right established by Art. 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Art. 19 it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable



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because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Art. 30(1) will be but a "teasing illusion," a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test--the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.

(16) We are, therefore, of the view that the R. 5(2) of the Rules for Primary Training Colleges, and Rr. 11 and 14 for recognition of Private Training institutions, in so far as they relate to reservation of seats therein under orders of Government, and directions given pursuant thereto regarding reservation of 80% of the seats and the threat to withhold grant-in-aid and recognition of the College, infringe the fundamental freedom guaranteed to the petitioners under Art. 30(1).

(17) The petitioners will therefore be entitled to writs in terms of prayers (a) (b), (c) and (d) in so far as they relate to reservation of seats under orders of Government, subject to the modification that reference to Cl. 12 of the rules in the prayers will be deleted in the Writ. The petitioners will be entitled to the costs of the petition.

Petition allowed.

NOTE: Are there some groupings in Indian society which Government must not merely refrain from discriminating against but must affirmatively assist?

What groups in India are "minorities . . . based on religion or language?" Brahma Samajis? Tamilians in Delhi? Tamilians in Tamil-nad? Gowda Saraswat Brahmins? Is every religious denomination (or section thereof) a minority based on religion? Is every caste a religious denomination (or section thereof)?

What is contained in the "absolute" rights guaranteed by Art. 30? Does it include more than respect for the group's autonomy? Does it include a right to some affirmative assistance from government? Are the rights conferred by Art. 29 (1) also absolute? See Jagdev Singh v. Pratap Singh, A.I.R. 1965 S.C. 183. To what groups do they apply?

There are still denominational institutions in the sphere of education. It is high time that these educational institutions, belonging to different castes and communities, go out of existence. The Government should neither recognize such institutions nor give them financial assistance. (Shriman Narayan, "Socialistic Pattern' and Social Revolution," [1955] reprinted in Weiner, ed., Developing India, Vol. II, p. 75.)*

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Is the policy recommended by Mr. Narayan constitutional? In toto? In part?
Not at all?

Are the infirmities in this recommendation due to the peculiar status of educational institutions? How about the proposal of an Indian social scientist that the numerous funds for the benefit of caste and religious groups should be merged into a general fund for the benefit of all the needy and deserving and that charities for the benefit of particular communal groups should be prohibited by law.

What animates these proposals? What effect might their realization have upon Indian society?

* * * * *

Another sort of religious question is how far the state can go to promote or facilitate the religious interests of its citizens. As you will have noticed, although there are (1) guarantees for all religious denominations and (2) special protections for minorities, there is little that is expressly Hindu about the constitution (unless 1 and 2 fit that description). How about Art, 48. Is this Hinduism or both? Can you see why the draftsmen of the Constitution preferred to put such a provision in the Directive Principles Part of the document rather than as a fundamental right?



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MOHD. HANIF QUARESHI AND OTHERS v.

STATE OF BIHAR, STATE OF U.P., STATE OF BOMBAY,
STATE OF MADHYA PRADESH, Respondents

A.I.R. 1958 S.C. 731 (V 45, C 98)
23rd April, 1958

S. R. Das C.J., T. L. Venkatarama Aiyar, S.K. Das, P. B. Gajendra-
gadkar and Vivian Bose JJ.

The following Judgment of the Court was delivered by

S.R. Das C.J. -- These 12 petitions under Art. 32 of our Constitution raise the question of the constitutional validity of three several legislative enactments banning the slaughter of certain animals passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh respectively. The controversy concerning the slaughter of cows has been raging in this country for a number of years and in the past it generated considerable illwill amongst the two major communities resulting even in riots and civil commotion in some places. We are, however, happy to note that the rival contentions of the parties to these proceedings have been urged before us without importing into them the heat of communal passion and in a rational and objective way, as a matter involving constitutional issues should be. Some of these petitions come from Bihar, some from U. P. and the rest from Madhya Pradesh, but as they raise common questions of law, it will be convenient to deal with and dispose of them together by one common judgment.

.....
(6) In order to appreciate the arguments advanced for and against the constitutional validity of the three impugned Acts it will be necessary to refer to the relevant provisions of the Constitution under or pursuant to which they have been made. Reference must first be made to Art. 48 which will be found in Chap. IV of the Constitution which enshrines what are called the directive principles of State policy. Under Art. 37 these directive principles are not enforceable by any court of law but are nevertheless fundamental in the governance of the country and are to be applied by the State in making laws. Article 48 runs thus:--

"Organisation of
agriculture and
animal husbandry.

48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle."

The principle purpose of this article, according to learned counsel for the petitioners, is to direct the State to endeavour to organise agriculture and

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animal husbandry on modern and scientific lines and the rest of the provisions of that article are ancillary to this principal purpose. They contend that the States are required to take steps for preserving and improving the breeds and for prohibiting the slaughter of the animals specified therein only with a view to implement that principal purpose, that is to say, only as parts of the general scheme for organising our agriculture and animal husbandry on modern and scientific lines. Learned counsel for the petitioners refer to the marginal note to Art. 48 in support of their contention on this part of the case. They also rely on entry 15 in List II of the Seventh Schedule to the Constitution. That entry reads: "Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice," There is no separate legislative head for prohibition of slaughter of animals and that fact, they claim, lends support to their conclusion that the prohibition of the slaughter of animals specified in the last part of Art. 48 is only ancillary to the principal directions for preservation, protection and improvement of stock, which is what is meant by organising agriculture and animal husbandry. Learned counsel for the respondents and Pandit Thakurdas Bhargave, who appears as amicus curiae, on the other hand, maintain that the article contains three distinct and separate directions, each of which should, they, urge, be implemented independently and as a separate charge. It is not necessary for us, on this occasion, to express a final opinion on this question. Suffice it to say that there is no conflict between the different parts of this article and indeed the two last directives for preserving and improving the breeds and for the prohibition of slaughter of certain specified animals represent, as is indicated by the words "in particular," two special aspects of the preceding general directive for organising agriculture and animal husbandry on modern and scientific lines. Whether the last two directives are ancillary to the first as contended for by learned counsel for the petitioners or are separate and independent items of directives as claimed by counsel on the other side, the directive for taking steps for preventing the slaughter of the animals is quite explicit and positive and contemplates a ban on the slaughter of the several categories of animals specified therein, namely, cows and calves and other cattle which answer the description of milch or draught cattle. The protection recommended by this part of the directive is in our opinion, confined only to cows and calves and to those animals which are presently or potentially capable of yielding milk or of doing work as draught cattle but does not, from the very nature of the purpose for which it is obviously recommended, extend to cattle which at one time were milch or draught cattle but which have ceased to be such. It is pursuant to these



directive principles and in exercise of the powers conferred by Arts. 248 and 246 of the Constitution read with entry 15 in List II of Sch. 7 thereto that the legislatures of Bihar, Uttar Pradesh and Madhya Pradesh have respectively enacted the statutes which are challenged as unconstitutional. In order properly to appreciate the meaning and scope of the impugned Acts it has to be borne in mind that each one of those Acts is a law with respect to "preservation, protection and improvement of stock," and their constitutional validity will have to be judged in that context and against that background. Keeping this consideration in view, we proceed now to examine the relevant provisions of the three Acts.

.....
(10) To sum up, under the Bihar Act there is in the State of Bihar a total ban on slaughter of all categories of animals of the species of bovine cattle. In Uttar Pradesh there is, under the U. P. Act, a total ban on the slaughter of cows and her progeny which include bulls, bullocks, heifer or calves. The buffaloes (male or female adults or calves) are completely outside the protection of the Act. In the present Madhya Pradesh and the districts which formerly formed part of Madhya Pradesh but have since been transferred to the State of Bombay and where the Madhya Pradesh law including the Madhya Pradesh Act still applies, there is a total ban on the slaughter of cow, male or female calves of a cow, bulls, bullocks, of heifers, and the slaughter of buffaloes (male or female adults or calves) are controlled in that their slaughter is permitted under certificate granted by the proper authorities mentioned in the Act. No exception has been made in any of these three Acts permitting slaughter of cattle even for bona fide religious purposes, such as has been made, say, in the Bombay Animal Preservation Act 1948 (Bom. LXXXI of 1948).

(11) As already stated the petitioners, who are citizens of India, and Muslims by religion, mostly belong to the Quraishi community and are generally engaged in the butchers' trade and its subsidiary undertakings such as supply of hides, tannery, glue making, gut making and blood de-hydrating. Those, who carry on the butchers' trade are mostly Kasais who, the petitioners say, kill only cattle but not sheep or goat which are slaughtered by other persons known as Chicks. Learned counsel appearing for the petitioners challenge the constitutional validity of the Acts respectively applicable to them on three grounds, namely, that they offend the fundamental rights guaranteed to them by Arts. 14, 19 (1) (g) and 25. . . .

(12) Before we actually take up and deal with the alleged infraction of the petitioners' fundamental rights, it is necessary to dispose of a preliminary question raised by Pandit Thakurdas Bhargava. It will be recalled that the impugned Acts



were made by the States in discharge of the obligations laid on them by Art. 48 to endeavour to organise agriculture and animal husbandry and in particular to take steps for preserving and improving the breeds and prohibiting the slaughter of certain specified animals. These directive principles, it is true, are not enforceable by any court of law but nevertheless they are fundamental in the governance of the country and it is the duty of the State to give effect to them. These laws having thus been made in discharge of that fundamental obligation imposed on the State, the fundamental rights conferred on the citizens and others by Chap. III of the Constitution must be regarded as subordinate to these laws. The directive principles, says learned counsel, are equally, if not more, fundamental and must prevail. We are unable to accept this argument as sound. Article 13 (2) expressly says that the State shall not make any law which takes away or abridges the rights conferred by Chap. III of our Constitution which enshrines the fundamental rights. The directive principles cannot over-ride this categorical restriction imposed on the legislative power of the State. A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Chap. III will be "a mere rope of sand." As this Court has said in the State of Madras v. Smt. Champakam Dorairajan, 1951 S C R 525 at p. 531: "The directive principles of State policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights."

(13) Coming now to the arguments as to the violation of the petitioners' fundamental rights, it will be convenient to take up first the complaint founded on Art. 25 (1). That article runs as follows:

Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

After referring to the provisions of cl. (2) which lays down certain exceptions which are not material for our present purpose this Court has, in Ratilal Panachand Gandhi v. State of Bombay, 1954 SC R 1055 at pp. 1062-1063: (A.I.R. 1954 S C 388 at p. 391) (B), explained the meaning and scope of this article thus:

Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any



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church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people."

What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meagre and it is surprising that on a matter of this description the allegations in the petition should be so vague. In the Bihar Petition No. 58 of 1956 are set out the following bald allegations:

That the petitioners further respectfully submit that the said impugned section also violates the fundamental rights of the petitioners guaranteed under Art. 25 of the Constitution inasmuch as on the occasion of their Bakr Id Day, it is the religious practice of the petitioners' community to sacrifice a cow on the said occasion. The poor members of the community usually sacrifice one cow for every 7 members whereas it would require one sheep or one goat for each member which would entail considerably more expense. As a result of the total ban imposed by the impugned section the petitioners would not even be allowed to make the said sacrifice which is a practice and custom in their religion, enjoined upon them by the Holy Quran, and practised by all Muslims from time immemorial and recognised as such in India.

The allegations in the other petitions are similar. These are met by an equally bald denial in paragraph 21 of the affidavit in opposition. No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem. We, however, find it laid down in Hamilton's translation of Hedaya Book XLIII at p. 592 that it is the duty of every free Mussalman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveller. The sacrifice established for one person is a goat and that for seven a cow or a camel. It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice

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seven goats. So there may be an economic compulsion although there is no religious compulsion. It is also pointed out that from time immemorial the Indian Mussalmans have been sacrificing cows and this practice, if not enjoined, is certainly sanctioned by their religion and it amounts to their practice of religion protected by Art. 25. While the petitioners claim that the sacrifice of a cow is essential, the State denies the obligatory nature of the religious practice. The fact, emphasised by the respondents, cannot be disputed, namely, that many Mussalmans do not sacrifice a cow on the Bakr Id Day. It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah, it is said, prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cows. We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners.

(14) The next complaint is against the denial of the equal protection of the law. It is thus formulated: The petitioners are Muslims by religion and butchers (Kasais) by occupation and they carry on the trade of selling beef. The impugned Acts prejudicially affect only the Muslim Kasais who kill cattle but not others who kill goats and sheep and who sell goats' meat and mutton. It is, therefore, clear that only the Muslim Kasais, who slaughter only cattle but not sheep or goats, have been singled out for hostile and discriminatory treatment. Their further grievance is that the U.P. Act makes a distinction even between butchers who kill cattle and butchers who kill buffaloes and the Madhya Pradesh Act also makes a like discrimination in that slaughter of buffaloes is permitted, although under certificate, while slaughter of cows, bulls, bullocks and calves is totally prohibited. In the premises the petitioners contend that the law which permits such discrimination must be struck down as violative of the salutary provisions of Art. 14 of the Constitution.

(15) The meaning, scope and effect of Art. 14, which is the equal protection clause in our Constitution, has been explained by this Court in a series of

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decisions . . . [citations omitted]. It is now well established that while Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, it has been held, may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts, it is accepted, must presume that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. We, therefore, proceed to examine the impugned Acts in the light of the principles thus enunciated by this Court.

(16) The impugned Acts, it may be recalled, have been made by the States in discharge of the obligations imposed on them by Art. 48. In order to implement the directive principles the respective Legislatures enacted the impugned Acts in exercise of the powers conferred on them by Art. 246 read with entry 15 in List II of the Seventh Schedule. It is, therefore, quite clear that the objects sought to be achieved by the impugned Acts are the preservation, protection and improvement of livestock. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for the agricultural economy of this country. Female buffaloes yield a large quantity of milk and are, therefore, well looked after and do not need as much protection as cows yielding a small quantity of milk require. As draught cattle male buffaloes are not half as useful as

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bullocks. Sheep and goat give very little milk compared to the cows and the female buffaloes and have practically no utility as draught animals. These different categories of animals being susceptible of classification into separate groups on the basis of their usefulness to society, the butchers who kill each category may also be placed in distinct classes according to the effect produced on society by the carrying on of their respective occupations. Indeed the butchers, who kill cattle, according to the allegations of the petitioners themselves in their respective petitions, form a well defined class based on their occupation. That classification is based on an intelligible differentia which places them in a well defined class and distinguishes them from those who kill goats and sheep and this differentia has a close connection with the object sought to be achieved by the impugned Act, namely the preservation, protection and improvement of our livestock. The attainment of these objectives may well necessitate that the slaughterers of cattle should be dealt with more stringently than the slaughterers of, say, goats and sheep. The impugned Acts, therefore, have adopted a classification on sound and intelligible basis and can quite clearly stand the test laid down in the decisions of this Court. Whatever objections there may be against the validity of the impugned Acts the denial of equal protection of the laws does not, prima facie, appear to us to be one of them. In any case, bearing in mind the presumption of constitutionality attaching to all enactments founded on the recognition by the Court of the fact that the legislature correctly appreciates the needs of its own people there appears to be no escape from the conclusion that the petitioners have not discharged the onus that was on them and the challenge under Art. 14 cannot, therefore, prevail.

.....

(18) The complaint of the petitioners under Art. 19 (1) (g) is that the impugned Acts, if enforced, will compel them at once to close down their business and will, in effect, amount to a complete denial of their right to carry on their occupation, trade or business in spite of the mandatory provisions of Art. 19 (1) (g). . . .

.....

(20) It is not necessary for us to dilate upon or to express any opinion on the rival contentions as abstract propositions. The matter has to be dealt with objectively. What do the Acts actually provide? In Uttar Pradesh the petitioners can freely slaughter buffaloes (male or female adults or calves) and



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sell their meat for food. It is also open to them to slaughter goats and sheep and sell the meat. Therefore, so far as the butchers of Uttar Pradesh are concerned, there is obviously no total prohibition of their occupation but only some restrictions have been imposed on them in respect of one part of their occupation, namely the slaughter of cows, bulls, bullocks and calves of cows. In Madhya Pradesh the Act, it is true, totally forbids the slaughter of cows including bulls, bullocks and cows but permits the slaughter of buffaloes (male or female adults or calves) under certain conditions. Therefore, in Madhya Pradesh also there is no law totally prohibiting the carrying on of the business of a butcher. In Bihar there is, no doubt a total ban against the slaughter of all animals belonging to the species of bovine cattle which includes buffaloes (male or female adults or calves) but it is still possible for the butchers of Bihar to slaughter goats and sheep and sell goats' meat and mutton for food. As will be seen hereafter the total ban on the slaughter of bulls, bullocks, buffaloes (male or female adults or calves) irrespective of their age or usefulness is, in our view, not a reasonable restriction imposed on the butchers (Kasais) in the interest of the general public and that being, therefore, void, no question can arise even in Bihar, of any total prohibition of the rights of butchers to carry on their occupation or business. In this view of the matter we need express no final opinion on the vexed question as to whether restrictions permissible under cl. (6) of Art. 19 may extend to total prohibition. . . . The question that calls for an answer from us is whether these restrictions are reasonable in the interests of the general public.

. . . [T]his Court has laid down the test of reasonableness in the following terms:

It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

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(22) The avowed object of each of the impugned Acts is to ensure the preservation, protection, and improvement of the cow and her progeny. This solicitude arises out of the appreciation of the usefulness of cattle in a predominantly agricultural society, Early Aryans recognised its importance as one of the most indispensable adjuncts of agriculture. It would appear that in Vedic times animal flesh formed the staple food of the people. This is attributable to the fact that the climate in that distant past was extremely cold and the Vedic Aryans had been a pastoral people before they settled down as agriculturists. In Rg. Vedic times goats, sheep, cows, buffaloes and even horses were slaughtered for food and for religious sacrifice and their flesh used to be offered to the Gods. Agni is called the "eater of ox or cow" in Rg. Veda (VIII. 43, 11). The slaying of a great ox (Mahoksa) or a "great Goat" (Mahaja) for the entertainment of a distinguished guest has been enjoined in the Satapatha Brahmana (III. 4.1-2). Yagnavalkya also expresses a similar view (Vaj. 1. 109). An interesting account of those early days will be found in Rg. Vedic Culture by Dr. A. C. Das, Chapter 5, pages 203-5 and in the History of Dharamasastras (Vol. II, Part II) by P. V. Kane at pages 772-773. Though the custom of slaughtering of cows and bulls prevailed during the vedic period, nevertheless, even in the Rg. Vedic times there seems to have grown up a revulsion of feeling against the custom. The cow gradually came to acquire a special sanctity and was called "Aghnya" (not to be slain). . . . There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.

(23) Cattle in India, is is said, has a treble role to play, namely, (i) to produce milk for food, (ii) bulls for draught and (iii) manure for agriculture. It is necessary to advert to the arguments advanced under each head. . . .

(28) The discussion in the foregoing paragraphs clearly establishes the usefulness of the cow and her progeny. They sustain the health of the nation by giving them the life giving milk which is so essential an item in a scientifically



balanced diet. The working bullocks are indispensable for our agriculture, for they supply power more than any other animal. Good breeding bulls are necessary to improve the breed so that the quality and stamina of the future cows and working bullocks may increase and the production of food and milk may improve and be in abundance. The dung of the animal is cheaper than the artificial manures and is extremely useful. In short, the back-bone of Indian agriculture is in a manner of speaking the cow and her progeny. Indeed Lord Linlithgow has truly said--"The cow and the working bullock have on their patient back the whole structure of Indian agriculture." (Report on the Marketing of Cattle in India, p. 20). If, therefore, we are to attain sufficiency in the production of food, if we are to maintain the nation's health, the efficiency and breed of our Cattle population must be considerably improved. To attain the above objectives we must devote greater attention to the preservation, protection and improvement of the stock and organise our agriculture and animal husbandry on modern and scientific lines. We have, therefore, to examine the provisions of the impugned Acts and ascertain whether they help in achieving the said objectives, or are calculated to hinder that process. In that context all the considerations above alluded to must enter the judicial verdict and if the impugned Acts further the aforesaid purpose then only can the restrictions imposed by the impugned Acts be said to be reasonable in the interest of the general public.

(29) We turn now to the other side of the picture. In examining the conspectus of the problem the Court cannot overlook the fact, emphasised in the petition, that the petitioners and a very large number of similarly situated persons, even if their number does not come up to the figure mentioned in the petition, are butchers (Kasais) by occupation and make an income of about Rs. 150 to Rs. 200 per month and that they will be seriously affected, if not completely thrown out of occupation, by the impugned Acts. It is true, for reasons hereinbefore stated, that they cannot complain that they have been completely deprived of their occupation or business but the enactments, if valid, will compel them to make fresh arrangements for the supply of animals which are permitted to be slaughtered for food. Theoretically it may not be impossible for them to do so, but in practice it is more than likely to cause considerable inconvenience to them and may even involve extra expenses for them. The hide merchants, who, they say in the petition, have made their arrangements for the supply to them of hides of slaughtered animals up to 95% of their requirements, may find it difficult to make fresh arrangements for procuring fallen hides. The same observations may be made about the gut merchants.



The immediate effect of the operation of these Acts is to cause a serious dislocation of the petitioners' business without any compensatory benefit. . . . [T]he immediate and possibly adverse impact of the impugned Acts on their occupation or business must, therefore, be taken into account as one of the important factors in judging the reasonableness or otherwise of the said Acts.

(30) There is also no getting away from the fact that beef or buffalo meat is an item of food for a large section of the people in India and in particular of the State of Bihar and Uttar Pradesh. . . . Poorer people, therefore, who can hardly afford fruit or milk or ghee are likely to suffer from malnutrition, if they are deprived of even one ounce of beef or buffalo flesh which may sometimes be within their reach. This aspect of the matter must also be taken into account in assessing the reasonableness of the provisions of the impugned Acts.

(32) The presence of a large number of useless and inefficient cattle in the midst of the good ones affect our agricultural economy in two ways. In the first place--and this is the crux of the matter--this surplus stock is pressing upon the scanty fodder and feed resources of the country and is an obstacle to making good the deficit.

(33) With a large population of animals in which the majority is not yielding adequate and prompt returns to the owners, the animals are naturally allowed to fend for themselves and to subsist on whatever the agriculturist is able to provide from his scanty sources for the maintenance of his stock. Naturally, therefore, the problem of substantial percentage of uneconomical cattles has cropped up along with that of stray, wild, old, diseased and uneconomical animals. These old and useless animals roaming about at pleasure in search of food are a nuisance and a source of danger in the countryside. They grow wild and become a menace to the crop production. As pointed out by the Report of the Expert Committee, the danger was actually seen by the members of that Committee in Pepsu where, it is significant to note, the slaughter is banned completely.

(34) The presence of a large number of old and useless animals also has a bad effect on the quality of the breed. There is a tendency for this population to multiply and bring into being progeny of a very inferior kind which is bound to adversely affect the production of milk or bullock power. It is absolutely necessary that this surplus cattle should be separated from the good and robust animals and a total ban on slaughter of cattle and buffaloes will contribute towards worsening the present condition.



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(35) The Cattle Preservation and Development Committee set up by the Government of India in 1948 at page 47 of its Report recommended, as a panacea for the evil menace of useless cattle, a scheme for the establishment of cattle concentration camp for the old and useless cattle. It is this scheme which subsequently came to be known by the name of Gosadana. . . .

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(41) To summarise: The country is in short supply of milch cattle, breeding bulls and working bullocks. If the nation is to maintain itself in health and nourishment and get adequate food, our cattle must be improved. In order to achieve this objective our cattle population fit for breeding and work must be properly fed and whatever cattle food is now at our disposal and whatever more we can produce must be made available to the useful cattle which are in presenti or will in futuro be capable of yielding milk or doing work. The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. To maintain them is to deprive the useful cattle of the much needed nourishment. The presence of so many useless animals tends to deteriorate the breed. Total ban on the slaughter of cattle, useful or otherwise, is calculated to bring about a serious dislocation, though not a complete stoppage, of the business of a considerable section of the people who are by occupation butchers (Kasais), hide merchants and so on. Such a ban will also deprive a large section of the people of what may be their staple food. At any rate, they will have to forgo the little protein food which may be within their means to take once or twice in the week. Preservation of useless cattle by establishment of Gosadans is not, for reasons already indicated, a practical proposition. Preservation of these useless animals by sending them to concentration camps to fend for themselves is to leave them to a process of slow death and does no good to them. On the contrary, it hurts the best interests of the nation in that the useless cattle deprive the useful ones of a good part of the cattle food, deteriorate the breed and eventually affect the production of milk and breeding bulls and working bullocks, besides involving an enormous expense which could be better utilised for more urgent national needs.

(42) We are not unmindful of the fact that beef and buffalo flesh from calves under one year of age, heifers and young castrated stock yielding meat of a superior quality fetch comparatively higher prices in the market and, therefore, the tendency of the butchers naturally is to slaughter young calves. This circumstance clearly warns us that calves, heifers and young castrated stock (cattle and buffalo) which will in future supply us milk and power for purposes of agriculture require protection. We also do not fail to bear in mind that for very

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good and cogent reasons cows also require protection. Cows give us milk and her progeny for future service. Unfortunately, however, the average milk yield of a cow, as already stated, is very much less than that of a she-buffalo. As the Gosamvardhan Enquiry Committee's Report points out, despite all the veneration professed for the cow, when it comes to the question of feeding, the she-buffalo always received favoured treatment and the cow has to be satisfied with whatever remains after feeding the she-buffaloes, bullocks, and calves in order of priority. The growth of cities and heavy demand for milk in the urban areas have contributed to the slaughter of good stock. For want of space no freshly calved animal can be brought in without getting rid of one that had gone dry. Salvage facilities not being available, or, if available, being uneconomical, the professional gowalas, who are mostly, if not wholly, Hindus, find it uneconomical to maintain the cow after she goes dry and consequently sell her to the butcher for slaughter at Rs. 30 to Rs. 50 per head, irrespective of her age and potential productivity, and import a fresh cow. The veneration professed for the sanctity attached to the cow does not prevent them from doing so. . . .

(45) The next question is as to what should be the scope of the ban on the slaughter of animals. One view is that the slaughter of all animals (cattle and buffaloes) of all categories should be regulated by the State and that animals below a specified age or not suffering from some natural deformity should not be allowed to be slaughtered. Drastic and stringent regulations have been imposed by municipal laws and have been tried but experience shows that they are not sufficient at least to protect the cow. It has been found to be extremely difficult to enforce the regulations for inadequacy of staff and veterinary inspectors, little or no check on the veterinary inspectors who succumb to the pressure or inducements of the butchers and pass animals not really useless as and for useless and aged animals. A large percentage of the animals not fit for slaughter are slaughtered surreptitiously outside the municipal limits. For reasons of economy rapacious gowalas or callous agriculturists find it uneconomical to maintain the dry cow and even resort to cruel practices and maim the cow in order to get her passed for slaughter. As already stated, the she-buffalo and the breeding bulls and working bullocks (both cattle and buffaloes) for their value, present and future, do not run the same amount of danger as a dry cow does. Regulation of slaughter of animals above a specified age may not be quite adequate protection for the cow but may be quite sufficient for the breeding bulls and working bullocks and the she-buffaloes. These considerations induce us to make an exception even in favour of the old and decrepit cows. The counsel for the petitioners, be it said to their credit, did not content otherwise.



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(44) After giving our most careful and anxious consideration to the pros and cons of the problem as indicated and discussed above and keeping in view the presumption in favour of the validity of the legislation and without any the least disrespect to the opinions of the legislatures concerned we feel that in discharging the ultimate responsibility cast on us by the Constitution we must approach and analyse the problem in an objective and realistic manner and then make our pronouncement on the reasonableness of the restrictions imposed by the impugned enactments. So approaching and analysing the problem, we have reached the conclusion (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public.

(45) We now proceed to test each of the impugned Acts in the light of the aforesaid conclusions we have arrived at. . . . [W]e uphold and declare that the Bihar Act in so far as it prohibits the slaughter of cows of all ages and calves of cows and calves of buffaloes, male and female, is constitutionally valid and we hold that, in so far as it totally prohibits the slaughter of she-buffaloes, breeding bulls and working bullocks (cattle and buffalo), without prescribing any test or requirement as to their age or usefulness, it infringes the rights of the petitioners under Art. 19 (1) (g) and is to that extent void.

(46) As regards the U. P. Act we uphold and declare, for reasons already stated, that it is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but we hold that in so far as it purports to totally prohibit the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness, it offends against Art. 19 (1) (g) and is to that extent void.

(47) As regards the Madhya Pradesh Act we likewise declare that it is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but that it is void in so far as it totally prohibits the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness. We also hold that the Act is valid in so far as it regulates the slaughter of other animals under certificates granted by the authorities mentioned therein.

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(48) In the premises we direct the respondent States not to enforce their respective Acts in so far as they have just been declared void by us. The parties will bear and pay their own costs of these applications.

Order accordingly.

NOTE: Does freedom of religion extend only to practices that are obligatory rather than optional? How and by whom is such obligatoriness to be determined? Is it to be decided by the practice of the community? (The local group of religionists or some wider group?) Is it to be decided according to texts revered by the community? As interpreted by whom? Acknowledged specialists or Courts? See Derrett, "The Definition of Religion in Indian Law," Bombay Law Reporter, Vol. LXI, pp. 17 ff. and "Postscript" at p. 38.

To what extent did Hindu reverence for the cow weigh in the Court's determination of the reasonableness of these restrictions? Do you think the role of these Hindu attitudes in the Court was the same as that in the legislatures.

Do you agree with the following: "Why was not the same criterion of usefulness applied to the question of the slaughter of cows. The Court's attempt to justify the discrimination is indeed a curious bit of reasoning which never faced this question frankly." "What is the significance of these legal bans on cow slaughter? Assuming that economic considerations have had relatively little to do with their enactment, they must be viewed primarily as attempts to impose the taboos of one religion upon all citizens. They are certainly contrary to the spirit of the secular state. . . . For some, cow protection is the symbol of Hindu dominance, and could well lead to more serious inroads on the secular state. For most, however, it appears to be an isolated objective, which, when attained, leads to nothing in particular. The anti-secular implications of the laws are significant, but should not be exaggerated." Donald E. Smith, India as a Secular State (1963) pp. 488-89. (See pp. 483-89 for the background of the controversy). *

Compare the Indian Supreme Court's curious bit of reasoning with that of the United States Supreme Court, upholding Sunday-closing laws, in Gallagher v. Crown Koshor Super Market, 366 U.S. 617 (1961).

How far does the imposition of Hindu "taboos" go? Compare the following excerpt from the opinion of Banerjee, J., in the case of Gadadhar Ghosh v. State of West Bengal, A.I.R. 1963 Cal. 565. Petitioner objected to the State's compulsory acquisition of land for the purpose of building a municipal slaughter-house.

Mr. Mukherjee contended, in the next place, that animal slaughter of the nature contemplated in the slaughter-house included cow-slaughter, which the directive principle contained in Article 48 of the Constitution discouraged. It was on this point Mr. Mukherjee mainly concentrated his attack and waxed into political eloquence. He thought that affidavit-in-reply (No. 3) by Basanta Kumar Chatterjee, a veteran in cow-protection, contained enough materials giving the factual basis of this branch of his argument. The affidavit-in-reply by Basanta Kumar Chatterjee contains matters mostly based on his personal belief and is dominated by a sentimental strain. Such an affidavit can ill-serve the purpose for which Mr. Mukherjee wants

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to utilise it. Then again, invocation to the directive principles as in Article 48 is useless before a Court of law, because none of the directives can be enforced by any Court of law. It is no doubt true that the directive principles are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. But so long as laws are not made under the one or other of the directives, an executive action for establishment of a slaughter-house, where cows may also be slaughtered, must not necessarily be condemned as violating the directive principles. The slaughter-house has been too much confused with cow slaughter and condemned, by Mr. Mukherjee, as an institution offensive to Hindu religious feeling, which holds cows sacred, as a gesture to win the support of the Muslims, who are said to be the principal beef eaters in the country, and also as an adventure which may deprive the country of good milk. All these criticisms appear to have been too easily made. It is one of the primary functions of a Government to look after the health of the people and for that end to arrange for supply of good food and medicine to them. Indians are not all vegetarians; there are many for whom meat is a part of their diet, or a necessity when they may afford. Animals slaughtered under insanitary conditions or diseased animals slaughtered in private butcheries do not supply hygienic food. If a State tries to set up a slaughter-house, so as to provide the people with good meat, the project is not per se condemnable. Mr. Mukherjee, however, contends that in such a slaughter-house, cows may also be slaughtered and that a State must not be allowed to indulge in such an activity. The directive as to prohibition of slaughter of cows, calves and other milch and draught cattle is not absolute. As pointed out by the Supreme Court in the case of Hanif Quareshi v. State of Bihar, AIR 1958 SC 731 the protection recommended by Article 48 is confined to cows and calves and to those other animals which are presently or potentially capable of yielding milk or doing work as draught cattle but does not extend to cattle which were at one time milch or draught cattle but has ceased to be such. I have no reason to suppose that the slaughter house will be so administered as to go against the directive principles of State Policy. The other criticism, namely that the establishment of the slaughter house would wound Hindu religious feeling and placate the Muslims only, does not appeal to me. The slaughter house is being established not for cow-slaughter only. Goats and sheep will also be slaughtered in the slaughter-house. It is common knowledge that many caste Hindus eat goat meat and sheep mutton. Goats and even buffaloes are also sacrificed, with a good deal of sacrificial pomp by the Shakti worshippers amongst the Hindus. To say that the establishment of the slaughter house is bound to wound Hindus religious feelings is to make an unthinking political criticism of the project, without more. Cow-slaughter, it is true, is disliked by the caste Hindus. Hindus do not, however, make the entire population of India. The Government has an equal duty to look after the welfare of non-Hindu population of India, by no means a negligible figure. It is no argument to say that a slaughter house, if at all to be established, there must not be slaughtered cows and bulls, the meat of which animals the caste Hindus do not eat. Such meat is not a taboo to Non-Hindus and there is no reason why State slaughter houses must not cater to



their needs as well. On reading the scheme for the establishment of the slaughter house, as in the affidavits-in-opposition, it appears to me that the slaughter house is being established to meet the need of hygienic meat for all religious denominations, Hindus and Non-Hindus alike. I, therefore, find no substance in the criticism that behind the project there is a hidden political purpose to placate the Muslims at the cost of the Hindus. The last criticism that the slaughter-house adventure will minimise the supply of milk in the country is also without substance. It could not be established that the administration of the slaughter-house would be so thoughtless as to slaughter milch cows only and thus blatantly violate the directive principles contained in Article 48 of the Constitution. I, therefore, overrule the second branch of the argument made by Mr. Mukherjee.

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C. Hereditary Rights and Individual Freedom

RUIWEINAO KAHASAN TANGKHUL, Appellant v.
RUIWEINAO SIMTREI SHAILEI KHULLAKPA, Respondent

A.I.R. 1961 Manipur 1

T. N. R. Tirumalpad J C.

... The respondent is the Khullakpa of the Somdal non-christian village in the Ukbrul sub-division. The appellant is a villager of the said village.

Both of them belong to the Tangkhul tribe of Nagas.

(3) The respondent filed the Civil Suit No. 119 of 1958-59 before the S. D. O., Ukbrul claiming a sum of Rs. 50/- from the appellant by way of fine and compensation for the latter's failure to offer one day's free labour or Khutlang to the respondent. Respondent's case was as follows:

It was a long standing custom of the village for each of the house-holders of the village to offer one day's free labour to the Headman or Khullakpa of the village for his being Headman and for his first settlement in the village. Accordingly every house-holder was offering the labour without any trouble. The appellant refused to offer such free labour in 1939. Thereupon there was a case in the Court of the S. D. O. as Miscellaneous Case No. 83 of 1939-40 filed by the respondent against the appellant in which a decree was passed that the villagers were bound to give the usual labour to the respondent and that the respondent shall announce to the village the day on which he wished his harvest to be cut and if the appellant or other villagers still refused to offer their free labour they will be fined Rs. 50/- which amount will be paid to the respondent as compensation. The said order of the S. D. O. Mr. S. J. Duncan dated 14-11-39 was marked as Est. 1 in the suit.

(4) It would appear that after this order of Mr. Duncan, the Khullakpas of the Tangkhul villages in the Ukbrul sub-division have been collecting from the villagers the said sum of Rs. 50/- per head in case they refused to offer their free labour. This practice appears to have continued even after Manipur ceased to be under the Maharajah and became part of the Union Territory of India after the Indian Constitution came into force. . . .

(5) Even after the decision the appellant does not appear to have given one day's free labour or the compensation in lieu thereof to the respondent in the subsequent years and the respondent came forward with the present suit claiming

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compensation of Rs. 50/- for the appellant's failure to offer the free labour in 1957. The plaint stated that the appellant totally ignored the custom and was creating chaos and that therefore an order for payment of a fine of Rs. 50/- as compensation for his failure to offer one day's free labour must be passed.

The appellant did not dispute the existence of a custom among the villagers to offer one day's free labour to the Khullakpa. His contention was that such free labour was being forcibly imposed on the villagers by the Khullakpa during the days of the British regime and that after the Indian Constitution came into force, no citizen of India can be compelled to such forced labour in the face of Art. 23 of the Constitution.

(6) Before I proceed to deal with the case, one thing has to be made clear, as there appears to have been some confusion in the minds of the S. D. O. and the District Judge. The custom pleaded by the respondent was one by which each house-holder of the village had to offer one day's free labour in a year to the Khullakpa for his being Khullakpa and for having got settlement of the village. Both the lower Courts appeared to have treated as part of the custom that in case any house-holder failed to offer one day's free labour he will have to pay a compensation of Rs. 50/- in lieu of such free labour.

The plaint did not mention this latter portion relating to compensation as part of the long-standing custom. The subject of compensation came in for the first time in the order of Mr. S. J. Duncan, S. D. O. in Miscellaneous Case No. 83 of 1939-40 by which he ordered that in case any villager refused to give the free labour, he will be fined Rs. 50/- and the said fine will be paid over to the respondent as compensation. Thus prior to 1939-40 there was no question of any compensation. As the appellant appears to have been the first man to refuse to offer the free labour and that too only in 1939, the idea of compensation cannot have entered into the picture earlier and it cannot have been part of the long-standing custom.

The truth of the matter appears to be that in the old days when the Khullakpa or Headman of the village was supreme he could enforce such free labour and the villagers also tacitly accepted his right to such free labour, but when modern ideas of freedom gradually began to creep into these hill villages, villagers began to refuse such free labour by 1939-40. Hence the Governmental authority in the form of the S. D. O. had to go to the help of the Khullakpa to compel such free labour by imposing fines on such of the villagers who were not willing to give such labour.

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Imposition of fine is a punishment. We do not know under what authority or law then in existence, the S. D. O.—Mr. Duncan imposed the fine in lieu of the free labour. None of the laws or rules then in existence have been brought to my notice which would permit of such a fine being imposed. Perhaps, the S.D.O. in the Hill areas in those days was the law-giver and the law-maker and the villagers never questioned his authority. In any case, Ext./1 makes it clear that the S. D. O. did not impose the fine of Rs. 50/- on the basis of any such custom pleaded before him that the Khullakpa was entitled to compensation of Rs. 50/- on the refusal of any villagers to give the free labour.

.....

(9) The existence of the immemorial custom to give one day's free labour to the Khullakpa by each house-hold was not, in fact, disputed. What was pleaded was that such a custom even though it may have been valid and enforceable in the old days on the basis of an implied contract came into conflict with Art. 23(1) of the Constitution which prohibited Begar and other forms of forced labour and hence the said custom became void under Art. 13 of the Constitution and it could no longer be enforced after 26-1-50.

Secondly, it was pointed out that the said custom being void, no Court of law can take notice of such a custom and give a decree for money compensation against a villager, who refused to accept such a custom and give the forced labour. Thus, the questions which arise for decision in this case are: (1) Whether the custom of one day's free-labour is opposed under Art. 23 and hence void under Art. 13 of the Constitution and (2) Whether a decree for compensation for refusal to give the free labour can be given by Court.

.....

(11) Now I shall proceed to deal with the questions. Though the respondent has called the custom as "free" labour, it cannot be denied that it is compulsory labour. It is called "free" in the sense that the labour has to be given without payment of any wages and not in the sense that it was voluntary labour. What the respondent really wants is that every villager should be compelled to give one day's labour to the Khullakpa without payment of any wages by reason of the fact that as Khullakpa or the Chief of the village the respondent renders certain services to the villagers. In my opinion, such demand for labour even if it is based on immemorial custom will certainly be hit by Art. 23(1). Article 23 is as follows:

23(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

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(2) Nothing in this article shall prevent the State from imposing service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

What is prohibited is begar and other similar forms of forced labour. The A.I.R. Commentaries on the Constitution of India at page 635 defines begar as a system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion. Thus when a Khullakpa insists on the basis of a custom that every villager in the village should render one day's labour to him in a year, it means that he is forcing or compelling the villagers to perform the labour.

It is this very matter which is prohibited under Art. 23. Article 23 is based to some extent on Art. 19(1) (f) which gives the freedom to every citizen of India to practise any profession, or to carry on any occupation, trade or business. This freedom which is guaranteed under the Constitution means that no citizen of India shall be compelled to work for another against his will. Prior to the Constitution, such compulsion was not looked down upon and persons in some kind of authority over others used to exact such work.

Thus, Zamindars and other land-holders compelled their tenants to render free service. Vide, Basu's Commentary on the Constitution of India, 3rd Edition, Vol. 1 page 311. Even the Indian Penal Code in sections 490 and 492 recognised such compulsory labour and provided for punishment for breaking the contract entered into for such labour. The said sections were subsequently repealed in 1925 when, presumably forced labour began to be looked down upon. Now this right against exploitation has been recognised as a fundamental right of the citizen under Art. 23 of the Constitution.

(12) It was contended before me that the Khullakpas performed valuable services for the village as Headmen and the position of such Khullakpas has been recognised under S. 6 of the Manipur State Hill People Regulation, 1947 and even in S. 3 of the Manipur (Village Authorities in Hill Areas) Act, 1956 and that it was in lieu of the services rendered by the Khullakpas that the "free" labour by each villager has been allowed by custom and that such free labour in return for services rendered will not come within the meaning of forced labour under Art. 23.

(13) Even granting that the labour is performed for certain services rendered by the Khullakpa, the element of compulsion still exists and it is this element of compulsion that Art. 23 prohibits. Even if it was for services rendered by the Khullakpa, he cannot insist on the villager performing free labour for him.



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(14) In that connection I may refer to the position of a Khullakpa in the Tangkhul villages. T. C. Hodson in his book "The Naga tribes of Manipur" deals with the Tangkhul Nagas. At page 74 of his book, he states that the Khullakpa is a village Officer. At page 79, he says:

Each village possesses at least one Officer called Khullakpa. For convenience of administration, he is often regarded as exercising secular authority, but in reality in ordinary village affairs, he has just that amount of influence to which he is on personal grounds entitled.

Here I may say that as seen from Ext. 1, the villagers started refusing the forced labour to the respondent in 1939 on the ground that the man was guilty of incest. He had thereby lost his influence. Again at page 80 of Hodson's book we find it stated that every village has three hereditary village Officers, Khullakpa, Luplakpa and Lambu and that if the Khullakpa be a man of wealth, he will be a man of influence, but usually this is not the case.

Thus the Khullakpa is at best only a village Officer. If the Khullakpa renders public service to the village, as a village Officer he must be treated as a public servant and payment for public service should be made from public revenues. Exaction in the form of labour cannot be insisted upon by a public servant from any citizen. The only authority who can compel a citizen to render service is the State as provided in Art. 23(2) and in doing so even the State cannot make any discrimination between man and man on the ground of religion, race, caste or class. It follows therefore that a Khullakpa cannot insist on the villagers of his village to render service to him. Even if it is based on immemorial custom, such custom violates Article 13(1) of the Constitution and has to be treated as void.

.....

In fact, the question for decision in this case is whether the appellant is liable to pay such money compensation if he refuses to give free labour. If the custom to perform free labour is void, then no Court of law can give a decree for money compensation if the custom is violated, as no villager is bound to obey a custom which is void. The decision of Mr. Duncan fining the villager by way of compensation has to be treated as a bad decision not based on any law or on any principle of natural justice.

.....

(17) It follows therefore that the decree passed against the appellant in the present case cannot be allowed to stand. The appeal is allowed and the suit filed by the respondent is dismissed. Respondent shall pay the costs of the appellant in all the Courts.

Appeal allowed.

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NOTE: Note the birth of the custom here! In what guise did "modern ideas of freedom" first appear?

What might be the political effects of such a decision? Does it merely ratify already existing power relationships? Does it make possible new kinds of attachments and affiliations?

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DASARATHA RAMA RAO v. STATE OF ANDH. PRA.

A.I.R. 1961 Supreme Court 565

.....
S. K. Das, J.: This is a writ petition under Art. 32 of the Constitution. Gazula Dasaratha Rama Rao is the petitioner. The respondents are (1) the State of Andhra Pradesh, (2) the Board of Revenue, Andhra Pradesh (3) the Collector of Guntur in Andhra Pradesh and (4) Vishnu Molakala Chandramowleshwara Rao. The petitioner prays that this Court must declare S. 6 of the Madras Hereditary Village-Offices Act, 1895 (Madras Act III of 1895), hereinafter called the Act, as void in so far as it infringes the fundamental right of the petitioner under Arts. 14 and 16 of the Constitution, and further asks for an appropriate writ or direction quashing certain orders passed by respondents 1 to 3 in favour of respondent No. 4 in the matter of the latter's appointment as Village Munsif of a newly constituted village called Peravalipalem. . . .

(2) The short facts are these: Village Peravali in Tenali taluq of the district of Guntur in the State of Andhra Pradesh was originally comprised of a village of the same name and a fairly large hamlet called Perivalipalem. The two were divided by a big drainage channel. It is stated that for purposes of village administration the villagers felt some difficulties in the two being treated as one unit. So the villagers, particularly those of the hamlet, put in an application to the Revenue authorities for constituting the hamlet into a separate village. This application was recommended by the Tehsildar and was accepted by the Board of Revenue and the State Government. By an order dated August 25, 1956, Peravali village was bifurcated and two villages were constituted. . . . It is convenient to read at this stage sub-s. (1) of S. 6 of the Act under which the bifurcation was made:

S. 6(1). In any local area in which this Act is in force the Board of Revenue may, subject to rules made in this behalf under section 20, group or amalgamate any two or more villages or portions thereof so as to form a single new village or divide any village into two or more villages and, thereupon, all hereditary village offices (of the classes defined in section 3, clause (1), of this Act) in the villages or portions of villages or village grouped, amalgamated or divided as aforesaid, shall cease to exist and new offices, which shall also be hereditary shall be created for the new village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished.



(3) On the division of the village into two villages, all the hereditary village offices of the original village ceased to exist under the aforesaid sub-section, and new offices were created for the two villages. We are concerned in this case with the appointment to the office of Village Munsif in the newly constituted village of Peravalipalem. In accordance with the provisions of sub-s. (1) of S. 6 and certain Standing Orders of the Board of Revenue, the Revenue Divisional Officer, Tenali, invited applications for the post of Village Munsif of Peravalipalem. Eight applications were made including one by the petitioner and another by respondent 4. Respondent 4, be it noted, is a son of the Village Munsif of the old village Peravali. By an order dated October 18, 1956, the Revenue Divisional Officer, appointed the petitioner as Village Munsif of Peravalipalem. From the order of the Revenue Divisional Officer, respondent 4 and some of the other unsuccessful applicants preferred appeals to respondent 3, the Collector of Guntur. By an order dated April 1, 1957, respondent 3 allowed the appeal of respondent 4 and appointed him as Village Munsif of Peravalipalem. In his order respondent 3 said:

Shri V. Chandramowleswara Rao is qualified for the post. He is the son of the present Village Munsif of Peravali and is, therefore, heir to that post. . . . S. 6 (1) of the Hereditary Village Offices Act states that in choosing a person to fill a new office of this kind the Collector shall select the person whom he may consider best qualified from among the family of the last holder of the office which has been abolished. The Village Munsif's post of the undivided village of Peravali was abolished when the village was divided and the new post of Village Munsif of Peravalipalem has to be filled up from among the family of the previous Village Munsif. The same instructions are contained in Board's Standing Order 148 (2).

(4) The petitioner then carried an appeal from the order of respondent 3 to the Board of Revenue. By an order dated April 24, 1958, the Board dismissed the appeal. . . .

(5) The petitioner relies mainly on clauses (1) and (2) of Art. 16 of the Constitution. We may read those clauses here:

Art. 16(1). There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.



On behalf of the petitioner it has been contended that (1) the office of Village Munsif of Peravalipalem is an office under the State, and (2) respondents 1 to 3 in passing their orders in favour of respondent 4 expressly stated that they proceeded on the basis of the hereditary principle laid down in S. 6(1) of the Act and discriminated against him as a citizen on the ground of descent only. This discrimination, it is argued, violates the guarantee of equal opportunity enshrined in Art. 16, cls. (1) and (2); and S. 6(1) of the Act to the extent that it permits such discrimination is void under Art. 13(1) of the Constitution.

(6) The first question before us is if the office of Village Munsif under the Act is an office under the State within the meaning of cls. (1) and (2) of Art. 16 of the Constitution. . . .

(7) The above gives in brief the scheme and provisions of the Act. These provisions show, in our opinion, that the office of Village Munsif under the Act is an office under the State. The appointment is made by the Collector, the emoluments are granted or continued by the State, the Collector has disciplinary powers over the Village Munsif including the power to remove, suspend or dismiss him, the qualifications for appointment can be laid down by the Board of Revenue--all these show that the office is not a private office under a private employer but is an office under the State. The nature of the duties to be performed by the Village Munsif under different provisions of the law empowering him in that behalf also shows that he holds a public office. He not only aids in collecting the revenue but exercises power of a magistrate and of a Civil Judge in petty cases. He has also certain police duties as to repressing and informing about crime, etc.

(8) The learned Advocate-General appearing for respondents 1 to 3 has contended that the expression "office under the State" in Art. 16 has no reference to an office like that of the Village Munsif, which in its origin was a customary village office later recognised and regulated by law. . . .

. . . Article 13 of the Constitution lays down inter alia that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with fundamental rights, shall to the extent of the inconsistency be void. In that Article 'law' includes custom or usage having the force of law. Therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, that custom must yield to a fundamental right. Our attention has also been drawn to Cl. (4) of Ar. 16 which enables the State to make provision for the reservation



of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The argument is that this clause refers to appointments or posts and further talks of inadequate representation in the services, and the learned Advocate-General has sought to restrict the scope of Cls. (1) and (2) of Art. 16 by reason of the provisions in Cl. (4). We are not concerned in this case with the true scope and effect of Cl. (4) and we express no opinion with regard to it. All that we say is that the expression 'office under the State' in Cls. (1) and (2) of Art. 16 must be given its natural meaning.

(1) We are unable, therefore, to accept the argument of the learned Advocate-General that the expression 'office under the State' in Art. 16 has a restricted connotation and does not include a village office like that of the Village Munsif.

.....
The simple question before us is whether the office, though it is an office under the State, is of such a nature that Cls. (1) and (2) of Art. 16 of the Constitution are not attracted to it. We are of the view that there is nothing in the nature of the office which takes it out of the ambit of Cls. (1) and (2) of Art. 16 of the Constitution. An office has its emoluments, and it would be wrong to hold that though the office is an office under the State, it is not within the ambit of Art. 16 because at a time prior to the Constitution, the law recognised a custom by which there was a preferential right to the office in the members of a particular family. The real question is--is that custom which is recognised and regulated by the Act consistent with the fundamental right guaranteed by Art. 16? We do not agree with learned Counsel for respondent 4 that the family had any pre-existing right to property in the shape of the emoluments of the office, independent or irrespective of the office. If there was no such pre-existing right to property apart from the office, then the answer must clearly be that Art. 16 applies and S. 6(1) of the Act in so far as it makes a discrimination on the ground of descent only, is violative of the fundamental right of the petitioner.

(13) There can be no doubt that S. 6(1) of the Act does embody a principle of discrimination on the ground of descent only. It says that in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished. This, in our opinion, is discrimination on the ground of descent only and is in contravention of Art. 16(2) of the Constitution.



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(16) For the reasons given above, we allow the petition. The orders of respondents 1 to 3 in respect of the appointment to the post of Village Munsif of Peravalipalem in favour of respondent 4 are set aside and we direct that the application of the petitioner for the said office be now considered on merits by the Revenue authorities concerned on the footing that S. 6(1) of the Act in so far as it infringes the fundamental right of the citizens of India under Art. 16 of the Constitution is void. The petitioner will be entitled to his costs of the hearing in this Court.

Petition allowed.

NOTE: Are all hereditary claims to office unenforceable? How about the hereditary head of a religious sect?

Suppose there is no dispute about succession and a hereditary officer seeks to sue a villager for his fees?

* * * * *

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MANEPALLI SATTEMMA, Petitioner v.
MANEPALLI SATYANARAYANA AND ANOTHER, Respondents

A.I.R. 1963 Andhra Pradesh 375

Chandra Reddy, C. J. and Gopal Rao Ekbote, J.

[This case concerns a dispute regarding lands which constitute the emoluments of the village blacksmith and carpenter in accordance with the Madras Hereditary Village Offices Act.]

.....

(9) It is convenient at this stage to read the relevant provisions of the Madras Hereditary Village Offices Act and of the Constitution. Section 3 of the Act III of 1895 enumerates certain classes of Village Offices as being governed by the Act. It divides these offices into four classes and we are here concerned with the fourth class. All the village artisans and village servants are grouped under this head. They are (i) the village carpenter, (ii) the village blacksmith, (iii) the village barber, (iv) the village washerman, (v) the village potter, (vi) the village astrologer and (vii) the village purohit or priest. The only other provision, which deals with this class of offices apart from Section 5, which lays down generally that the emoluments attached to these offices are inalienable and not liable to attachment, is Section 12 which contains the principle of succession governing offices within the terms of class (4) of Section 3. It says:

The succession to village offices forming class (4) in Section 3 shall devolve in accordance with the law or custom applicable thereto at the date on which this Act comes into force.

(10) AS we are required to consider the effect of the impact of Art. 16 of the Constitution on this section in this enquiry, we have to turn to Art. 16. That Article in so far as it is of immediate relevancy runs as follows:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

... [T]he purpose of Article 16 is to afford equality of opportunity to all citizens in respect of employment or appointment to any office under the State. Stress is laid by both the clauses on employment or appointment. Thus, the concept



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of employment is dominant in this Article. So, Section 12 will come into conflict with this Article only if it serves to make a discrimination between one citizen and another in regard to employment or appointment to an office under the State i.e., where preferential treatment is given by that section to persons of a particular descent.

(12) The learned counsel for the petitioner seeks to bring Section 12 within the prohibition enacted by Article 16 on the contention that this Article governs all offices under the State irrespective of the nature of the office. The learned counsel cites the . . . judgment of the Supreme Court in *Dasaratha Rama Rao v. State of Andhra Pradesh* . . . as exemplifying this proposition.

(13) In the . . . case cited above, the Supreme Court had to consider whether Section 6 (1) of the Madras Hereditary Village Offices Act embodies a principle of discrimination on the ground of descent only and whether the office of Village Munsif under that Act is an office under the State within the mischief of clauses (1) and (2) of Art. 16 of the Constitution and their Lordships answered both the questions in the affirmative. The main consideration that prevailed with their Lordships in this behalf was that the appointment of Village Munsif is made by the Collector though in that behalf the hereditary right of the members of the family of the last male-holder was to be taken into consideration and that disciplinary jurisdiction was exercised by the Revenue Officials. It is to be noted that under Section 10 of that Act only persons answering the qualifications contemplated by that section could be selected by the Collector. It is, therefore, a case of appointment being made by the Collector. Further, the succession devolves on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindari in Southern India. Thus, under that section, the vacancy has to be filled up by the Collector from among the persons belonging to the family of the last male-holder possessing the qualifications laid down in the section.

. . . The ratio decidendi is contained in the following words of their Lordships:

The appointment is made by the Collector, the emoluments are granted or continued by the State, the Collector has disciplinary powers over the Village Munsif including the power to remove, suspend or dismiss him, the qualifications for appointment can be laid down by the Board of Revenue—all these show that the office is not a private office under a private employer but is an office under the State. The nature of the duties to be performed by the Village Munsif under different provisions of the law empowering him in that behalf also shows that he holds a public office. He not only aids in collecting the revenue but exercises power of a Magistrate and of a Civil Judge in petty cases. He has also certain police duties as to representing and informing about crime etc.

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(14) None of these elements are present in the case of the office of Blacksmith or carpenter. There are vital differences between the office of Village Munsif and that of the carpenter or Blacksmith. The latter is not appointed by the Collector or for a matter of that by any Revenue Official, while the Village Munsif, notwithstanding the provisions of Section 10(2), has to fulfil certain qualifications and has to be appointed by the Collector. He is a personal appointee in the sense that he has to be chosen or selected by the Revenue Official. There is also no disciplinary jurisdiction exercised by any of the Revenue Officials so far as the offices listed in class (4) in Section 3 are concerned. The only provision that is made by the Act as regards the village artisans and village servants is the one underlying Section 12 providing for succession to these offices "in accordance with the law or custom applicable thereto." It is also to be borne in mind that this office is not restricted to any single individual as in the case of Class (1) offices as per the rule contained in Section 10 (2). If all the members of the family are entitled to succeed to any property under the law that governs these artisans and servants, the same principle will apply to them even in regard to succession to this office.

The fact that under Board's Standing Order 55 the artisan inams could be resumed under certain circumstances would not attract the prohibition enacted by Article 16. The fundamental right guaranteed by Art. 16 (1) is equality of opportunity in respect of an appointment. If no appointment is to be made by any officer of the State, then there is no question of violating the principle embodied in Art. 16. The underlying principle of this Article is that all citizens of India, irrespective of the considerations catalogued in clause (2), should be given an opportunity to compete for a particular office. All candidates must be subject to the same test and they should have the same opportunities. Where is the question of affording equal opportunities in regard to an appointment when there is no appointment at all? Further, what is the test to which these people should be subjected? If there is no appointment, could it be postulated that all citizens of India are entitled to render the service and enjoy the emoluments attached to that office? It is only when an element of discrimination is introduced in the matter of making selections to a post under the State that Article 16 of the Constitution is attracted. In the absence of any such ingredient, it is difficult to premise that it falls within the purview of Art. 16. It should be borne in mind that Art. 16 deals with the subject of employment or appointment and not with distribution of emoluments.



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(15) This interpretation of ours does not have the effect of cutting down the amplitude of Art. 16. On the other hand, this is in consonance with the letter and spirit of that Article.

(16) We do not think that the principle adumbrated in (1961) 1 SCJ 310 (A.I.R. 1961 S.C. 564) governs the office of Blacksmith or carpenter. . . .

. . . Our answer, therefore, is that the impugned section is outside the pale of Article 16 and is unaffected by it.

NOTE: What is the "spirit" of Art. 16, according to the High Court?

How might these decisions (Sattemma and Dasaratha Rama Rao) affect village organization?

* * * * *

Pre-emption is the right of some privileged class of purchases (neighbors, relatives, etc. of the vendor) to come in when land is sold and buy it, pre-empting or supplanting a purchaser who is not in the preferred class. It originated in Muslim law, but became general over much of India, applicable as customary law to both Hindus and Muslims. In some areas, these customary rights were formalized and regulated by statute. In this case the pre-empted purchaser complains that such a statute offends Art. 19 (1) (f) of the Constitution.

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BHAU RAM v. RAIJ NATH

1962 Supreme Court 1479

Wanchoo, J.

WANCHOO, J.: (For himself and Gajendragadkar and N. Rajagopala Ayyangar JJ.)

These three appeals which have been heard together raise the constitutionality of certain provisions of the pre-emption laws prevailing in the States of Madhya Pradesh (Rewa-State area), Delhi and Maharashtra (Berar-area). Three suits for pre-emption were brought by pre-emptors which were decreed, and the present appeals are by purchasers. Though the appeals were heard together as some of the points involved were common, it would be convenient to deal with each appeal separately because the law involved in each case is different.

(2) We shall begin with C. A. 270 of 1955. This is concerned with the Rewa State Pre-emption Act, 1946 (hereinafter called the Rewa Act,) and particularly with S. 10 thereof, which is in these terms:--

Classes of pre-emptors:--Persons of the following classes shall have a right of pre-emption:--

(1) Any person who is a co-sharer or partner in the property sold and foreclosed.

(2) Any person who owns any immovable property adjoining the property sold or foreclosed or in case of transfer of tenancy rights, the land which is the subject of such rights.

Provided that among the above mentioned classes the first in order will exclude the second and among persons of the same class, the nearer in relationship to the person whose property is sold or foreclosed will exclude the more remote.

We are in the present case concerned with the second clause by which a person owning immovable property adjoining the property sold or foreclosed is entitled to pre-empt subject to the order provided in the proviso. In this case, both the purchaser and the pre-emptors hold property adjoining the property sold, but as the pre-emptors were related to the vendor, while the purchaser was not, the suit was decreed in favour of the pre-emptors in view of the proviso.

(3) The question therefore that arises is whether a right of pre-emption by vicinage offends Art. 19(1) (f). There has been divergence of opinion between various High Courts on this question. . . .

(4) Article 19(1) (f) gives a fundamental right to a citizen to acquire, hold and dispose of property and cl. (5) of that Article permits reasonable restrictions to be imposed by law on this right in the interests of the general public. There can be no doubt that a law of pre-emption does impose restriction



on the fundamental right guaranteed under Art. 19(1) (f) and the question is whether the restriction imposed in the Rewa case is reasonable and in the interests of the general public. Section 10 of the Rewa Act applies to all kinds of property, whether urban or rural, and whether agricultural land or house property, and it is in that context that its reasonableness will have to be judged. There is nothing to show in this case that there was any pre-existing custom of a similar nature prevalent in any part of the area to which the Rewa Act applies, and even if any custom was prevalent in any area, there is nothing to show what precisely that custom was. In any case even if any custom was prevalent in this area before the Rewa Act came into force and it was held reasonable by courts, that would not in our opinion be a decisive factor in considering whether the restrictions imposed by the Rewa Act are reasonable or not. We have to judge the reasonableness of the law in the context of the fundamental rights which were for the first time conferred by the Constitution on the people of this country and which were not there when the courts might have considered the reasonableness of the custom, if any, in the context of things then prevalent. Nor do we think that the fact that the right of pre-emption may not be actually exercised in the case of even a large number of sales can have any bearing on the question whether the law imposing the restriction is reasonable or not. We have to judge the reasonableness of the law in the context of the fundamental rights which were for the first time conferred by the Constitution on the people of this country and which were not there when the courts might have considered the reasonableness of the custom, if any, in the context of things then prevalent. Nor do we think that the fact that the right of pre-emption may not be actually exercised in the case of even a large number of sales can have any bearing on the question whether the law imposing the restriction is reasonable or not.

(5) Let us therefore see what the Rewa Act provides. Section 10, as we have pointed out, gives a right of pre-emption first to co-sharers and secondly to owners of adjoining property to which we shall refer hereafter as pre-emption by vicinage. We are not concerned in the present appeal with the case of co-sharers. . . . Ordinarily, if there was no law of pre-emption a vendor would be entitled to sell his property to anybody for any price that may be settled between him and the purchaser. This right is clearly restricted by the law of pre-emption which may in many cases result in a depression of the price which the vendor may otherwise be able to get for his property. . . .

.....



(7) Let us further look to the broader aspects of the provisions relating to pre-emption by vicinage. It may be stated that the right of pre-emption was not recognised under the Hindu law and is not enforced in large parts of this country to the south of the Vindhyas. It came to be enforced after the advent of Mahomedan rule as based on custom which was accepted by courts, particularly in Northern India. While in Northern India the courts enforced the right of pre-emption based on custom, even where there was no statutory law of pre-emption holding that it was in accordance with justice, equity and good conscience, in Southern India the view taken was that it was opposed to principles of justice, equity and good conscience: see Ibrahim Saib v. Muni Mir Udin Saib, 6 Mad H.C.R. 26 and Mohamed Beg Amin Beg v. Narayan Meghaji Patil, ILR 40 Bom 358: (AIR 1916 Bom 255). The reasonableness of a custom is, however, not a constant factor and what is reasonable at one stage of the progress of society may not be so at another stage. It is in this context that we have to judge the law of pre-emption as it was later put into various statutes. Before the Constitution came into force, the statutes if they were passed by competent authority, could not be challenged; but we have not to judge the reasonableness of these statutes in the light of the fundamental rights guaranteed to the citizens of this country by the Constitution. In a society where certain classes were privileged and preferred to live in groups and there were discriminations, on grounds of religion, race and caste, there may have been some utility in allowing persons to prevent a stranger from acquiring property in an area which had been populated by a particular fraternity or class of people and in those times a right of pre-emption which would oust a stranger from the neighbourhood may have been tolerable or reasonable. But the Constitution now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them under Art. 15 and guarantees a right to every citizen to acquire, hold and dispose of property, subject only to restrictions which may be reasonable and in the interests of the general public. Though therefore the ostensible reason for pre-emption may be vicinage, the real reason behind the law was to prevent a stranger from acquiring property in any area which had been populated by a particular fraternity or class of people. In effect, therefore, the law of pre-emption based on vicinage was really meant to prevent strangers i.e. people belonging to different religion, race or caste, from acquiring property. Such division of society now into groups and exclusion of strangers from any locality cannot be considered reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now and the law must be held to impose an unreasonable restriction on the right to acquire, hold and dispose of property as now



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guaranteed under Art. 19(1) (f), for it is impossible to see such restrictions as reasonable and in the interests of the general public in the state of society in the present day.

(8) It is urged, however, that at any rate, in the case of agricultural properties, pre-emption by vicinage results in consolidation of agricultural lands, and that at any rate is an advantage. How far the argument of consolidation of agricultural lands, and that at any rate is an advantage. How far the argument of consolidation can be availed of now when we find that in most States laws are being passed which are putting ceilings on agricultural holdings is a matter which it is unnecessary to consider in the present case, for the Rewa Act applies not only to agricultural holdings but also to urban property including house property. There is no question of any advantage arising out of consolidation where one is dealing with urban property or house property. The matter of consolidation might have had some bearing if the Rewa Act was applicable to agricultural lands only. But as it applies to urban lands as well as house property where no question of consolidation of holdings arises, the impugned provision cannot be held to be a reasonable restriction in the interests of the general public on the ground that it leads to consolidation of agricultural holdings. There is no way of severing the application of the law so far as it relates to agricultural holdings from its application to urban or house property and therefore the entire provision as to vicinage must fall, even if something could be said in its favour with respect to agricultural holdings on the ground of consolidation. We are therefore of opinion that the second clause of Sec. 10 imposes an unreasonable restriction on the right to acquire, hold or dispose of property guaranteed under Art. 19(1) (f) of the Constitution and must be struck down. So far as the proviso is concerned it applies both to the first and the second clauses and it will survive for the purposes of the first clause only, which is not in dispute before us.

.....
[SARKAR, J., dissenting:]

... The question then is whether the restriction on the right to acquire property is unreasonable. Is it unreasonable to say that one shall not acquire a particular property if the adjoining owner wants it? It is not as if the purchaser is prevented from acquiring any property. There must be many other properties more or less equally good which he is free to acquire. As we have earlier pointed out, there would not be many cases in which the right of pre-emption would be exercised with the consequent restriction on a stranger's right

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to purchase. Now if the property is agricultural land there is no doubt that the right of pre-emption on grounds of vicinage will help consolidation of holdings. We think that balancing the advantages of the consolidation of holdings with the disadvantages resulting to a stranger by the restriction imposed on his right of acquiring that property, there is no doubt that the disadvantages are of small consequence. The advantages arising from the consolidation of agricultural holdings will be discussed in the last case that we will consider and which comes from Berar.

(33) The Rewa Act however is not confined to agricultural land. It creates a right of pre-emption in other property also. Let us consider the case of house property in a town or village. In a town or village the Indian way of life has been to live in compact communities. There is no doubt that such living has great advantages. It is true that due to economic reasons it is not always possible nowadays for many to have the comfort of living in compact communities. But the fact that economic conditions are breaking up compact communities does not show that living in such communities has not its advantages. It seems to us that such living would help to maintain the homogeneity, comfort and peace of the people. It is common human experience that property leads to disputes concerning boundaries, easement and concerning divers other rights connected with it. Also disputes arise because of different ways of living. Now most of these disputes would be with the adjoining owners. The right of pre-emption based on the ground of vicinage would help to avoid these disputes coming into existence. Again, it would be a great discomfort for a number of people living together for years to have to accept among themselves an outsider who may not be able to fit himself into that community or may even be an undesirable person. Furthermore, if a person is given preference in acquiring neighbouring property it would help him better to manage his properties. Privacy of the home would be better maintained. Against all these advantages the only disadvantage that the purchaser suffers is that he cannot acquire a particular property. It will often be possible for him to get another equally good property. It cannot be said that if between two such competing persons the law favours one who owns neighbouring property, the law is putting unreasonable restriction on the other person.

.....
(35) One of the advantages of the law of pre-emption based on vicinage earlier noticed is the preservation of the privacy of homes. In regard to this, it was said that purdah system has disappeared and therefore there is no need



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to protect it. It may be that purdah has disappeared but it cannot be said that the privacy of the home is a thing which is of no value nowadays. It is this that the law of pre-emption will protect and therefore be of advantage to the community. We think it wrong to imagine that privacy of a home is of value only to the people observing purdah.

(36) Then it is said that living in compact communities has also disappeared and people now live in flats. But we do not think that it can be suggested that living in communities has not its advantages or living in flats is an ideal system. These are therefore no arguments against the view that living in compact and homogeneous communities is still desirable and has still its advantages which perhaps will always remain.

(37) It is also said that the restriction imposed by the law of pre-emption is unreasonable because it encourages discrimination on the ground of religion, race and caste and this is what Art. 15 of the Constitution forbids. We do not think that it is a reasonable reading of the Constitution to say that it forbids people of one race, religion or caste from living together. Furthermore, compact communities are not always of the same race, religion or caste. The advantage is not due to identity of caste etc. but to the identity of thought and way of living and ties generated by long familiarity with each other and the families of each other. For all these reasons a restriction imposed by the law of pre-emption based on vicinage is, in our view, a reasonable restriction on the right to acquire and dispose of property.

NOTE: Do the majority and the dissenter differ in their view of what Indian society is like? What it ought to be? In their evaluation of caste and community?

Although the case turns on Art. 19 rather than on any constitutional provision which deals explicitly with caste, can the result fairly be derived from the constitutional position of caste?

What significance is given to local notions of what is "reasonable?" Is it appropriate to make governmental action in regard to such local matters subject to national standards? What makes it appropriate? What kind of changes does this portend for Indian civilization?

What is the role of the Constitution and the Supreme Court as its expositor, in unifying India?

Does this decision imply that all pre-emption laws are invalid. One year later the Supreme Court was confronted with another pre-emption case. But here the right of pre-emption was confined to members of the family of the vendor:

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... The grounds for upholding S. 15(a) as reasonable and in the interest of the general public therefore finally resolve themselves into two:

- (1) to preserve the integrity of the village and the village community; and
- (2) to implement the agnativ rule of succession.

(18) The objective underlying the first ground is prima facie reasonable and calculated to further the interest of the general public. It was however pointed out by learned Counsel for the appellant that with the large scale migration of population into Punjab consequent on the problems created by partition there has been a disintegration of the village community and that in the circumstances, what is at the present date imperatively required is not the keeping out of strangers from rural areas but rather for their being absorbed into the village community and that in that context the existence of a law which prevented such absorption could not be characterised as being either reasonable or in the interests of the general public. Though we see some force in this submission of learned Counsel we are unable to accept it as a final and conclusive answer to the argument against the reasonableness of the provision for we find that in the schemes for rehabilitation of the refugees the principle of the integrity of the village community and the need to maintain some degree of cohesion as regards the population in each village has been observed and, indeed, forms the basis of the methods by which different groups of refugees were settled in various parts of the Punjab. It has thus been possible to reconcile somewhat the needs of the refugees being settled in India, with the preservation of the integrity of the village community.

(19) Even if this ground cannot serve to sustain the constitutionality of the provisions, we consider that the other ground viz., that the next in succession should have the chance of retaining the property in the family, would suffice to render the restriction reasonable and in the interest of the general public within Art. 19(5). . . . Under S. 15 of the Act, . . . the right of pre-emption is confined to the members of the family of the vendor, i.e., those who would have succeeded to the property in the absence of any alienation.

- (20) The relevant portion of S. 15 (1) after amendment reads:
15. (1) The right of pre-emption in respect of agricultural land and village immovable property shall vest--
- (a) where the sale is by a sole owner,--First, in the son or daughter or son's son or daughter's son of the vendor; Secondly, in the brother or brother's son of the vendor; Thirdly, in the father's brother or father's brother's son of the vendor; Fourthly. . . ."

(21) No doubt, the son and the other members of the family would not have been entitled to a present interest in the property alienated and consequently would not have a right to prevent the alienation (in which event, however, it is needless to add that a right to pre-empt was wholly unnecessary as a means of preserving the property), but they would have a legitimate expectation of succeeding to the property--an expectation founded on and promoted by the consciousness of the community. If the social consciousness did engender such feelings



and taking into account the very strong sentimental value that is attached to the continued possession of family property in the Punjab, it could not be said that the restriction on the right of free alienation imposed by S. 15 (2) (a) (sic. S. 15(1) (a)?) limited as it is to the small class of near relations of the vendor is either unreasonable or not in the interest of the general public. The result is the appeal fails and is dismissed with costs. (Ram Sarup V. Munshi, A.I.R. 1963 S.C. 553, 560.)

* * * * *

A FINAL NOTE

How would you assess the impact of the modern legal system on Indian civilization. There is much disagreement among observers about the effect and suitability of the present legal system. Compare the following:

A British District Officer in the Punjab:

... we proceeded, with the best of intentions, to clamp down upon India a vast system of law and administration which was for the most part quite unsuited to the people. ... In Indian conditions the whole elaborate machinery of English law, which Englishmen tended to think so perfect, simply didn't work and had been completely perverted. (Penderel Moon, Strangers in India [New York, 1955] pp.22, 38)*

An Anthropologist, after analyzing the ethnographic materials on the relation of villagers to the courts:

The inadequacies of procedure, scope for chicanery and cheating, the lack of fit with indigenous jural postulates notwithstanding, the court system is not now an alien or imposed institution but part of the life of the village. Some villagers have learned to use the courts for their own ends, often with astuteness and effectiveness. (B. S. Cohn, "Anthropological Notes on Disputes and Law in India," [Typescript, Chicago, 1964] 52.)

An eminent American legal scholar:

India faces, in my judgment, several inherent difficulties in developing a more effective and creative judicial process. In the first place, the law on the books in India today is, for the most part, not an indigenous product. We actually have little knowledge as to just how well this law, so largely based on English common law, either fits the traditional values and attitudes of Indian society or is appropriate for the kind of social and economic development that India is now undertaking. My own, largely intuitive judgment is that in many aspects the fit is rather poor. (A. T. von Mehren, "The Judicial Process with Particular Reference to the United States and India," Journal of the Indian Law Institute, Vol. 5, pp. 271, 277-78 [1963].) *

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An Indian Attorney-General:

For over a hundred years distinguished jurists and judges in India have, basing themselves upon the theories of English common law and statutes, evolved doctrines of their own suited to the peculiar need and environment of India. So has been built up on the basis of the principles of English law the fabric of modern Indian law which notwithstanding its foreign roots and origin is unmistakably Indian in its outlook and operation. (M. C. Setalvad [Attorney-General of India], The Common Law in India [London, 1960] p. 225.)*

Can these views be reconciled? To what extent are they incompatible? How would one go about testing these estimates?

On the basis of your reading of the cases, would you agree that there is a "gap" between official legal doctrine and indigenous notions? In what respects does the law not fit the values, attitudes and concerns of Indian society?

Does this gap introduce a new kind of diversity into Indian civilization? How does it compare with the gap between local law and sacred law in earlier times? Does it correspond with or cut across other cleavages in Indian society--between traditional and modern, rural and urban, educated and illiterate, rich and poor?

What are the consequences of such a gap? For the villager? The urbanite? The official? The reformer? What devices, ideas and groups are available to bridge the gap?

In what respects is the present legal system a unifying element in India? What devices does it provide for eliminating diversity? For accommodating diversity? What kinds of diversity does it tend to eradicate or diminish? What kinds does it tolerate? What kinds does it promote?

Can the results of this legal system be thought of as modernization? Does it invariably undermine traditional values and procedures? What is its effect on traditional methods of settling disputes? Traditional methods of change? Are they replaced or merely supplemented?

In what respects is the modern legal system conducive to change in Indian society? What kinds of change does it promote? What kinds of change does it impede? What methods of change does it legitimate? What kinds of social groupings and formations does it encourage?

Is the modern legal system merely part of a "Western" facade, behind which lies the "real India?"

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HINDU LAW AND THE DEVELOPMENT OF THE MODERN INDIAN LEGAL SYSTEM

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... India represents the phenomenon of contact
between the law of the conqueror and that of the
conquered on the largest scale and in the most
instructive form.

Lord Bryce¹

A Modern Legal System

Indian law is, for the most part, palpably "foreign" in origin or inspiration and it is notoriously incongruent with the attitudes and concerns of much of the population which lives under it. However, the present legal system is firmly established and the likelihood of its replacement by a revived "indigenous" system is extremely small. As an instance of the apparent displacement of a major intellectual and institutional complex by one largely of foreign inspiration, the modern Indian legal system raises puzzling questions about the integrity and continuity of Indian civilization and about the role of the legal system within that civilization. This paper attempts to elucidate these matters by discussing the relationship between the present legal system and the indigenous legal systems -- in particular that system known as Hindu law. After brief consideration of the characteristic features of a modern legal system, it proceeds to discuss the development of such a system in India, the role of Hindu law in this development, and the effect of this development on Hindu law. It is submitted that while features of "traditional" law are still operative in Indian society they have been displaced from the legal system itself; that Hindu law as a procedural-technical system of law plays no significant role in the nature or operation of the modern Indian legal system; that the development of this legal system in which Hindu law is so uninfluential represents a conjunction of some peculiar characteristics of Hindu law and Indian society with more general dynamics of legal change.

One of the outstanding achievements of British rule in India was the formation of a unified nationwide "modern" legal system.² The word modern is used here to refer to a cluster of features which characterize, to a greater or lesser extent, the legal systems of the industrial societies of the last century. Many of these features have appeared and do appear elsewhere; some of them may be absent to some degree in one or another industrial society. However various the substantive law which is administered through such a system, the salient features of such a modern legal system include at least the following:

¹Studies in History and Jurisprudence (Oxford, 1901) 113.

²Nationwide is too narrow, since the system covers the whole primary area of Indian civilization, (of course many enclaves and anomalies remain). For the most part, what is said here regarding events prior to 1947 applies to that part of the sub-continent now in Pakistan as well as in India.

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Marc Galanter
HINDU LAW

1. Uniform law. It consists of rules that are uniform and unvarying in their application. The application of these laws is territorial rather than 'personal' -- i.e., the same rules are applicable to members of all religions, tribes, localities, castes, and classes. The differences among persons recognized by the law are not differences in intrinsic kind or quality, but differences of function, condition and achievement in mundane pursuits.

2. Transactional law. The legal system apportions rights and obligations as they result from transactions (contractual, criminal, tortious, etc.) between the parties rather than having them aggregated in unchanging clusters which attach because of determinants outside the particular transactions.³ Such "status" clusters of rights and obligations as do exist are based upon mundane function or condition (e.g., employer, wife) rather than upon differences of inherent worth or sacramental honor.

3. Universalistic law. Particular instances of regulating are devised to exemplify a valid standard of general applicability rather than to express that which is unique and intuited. Thus the application of law is "reproducible."

4. Hierarchy. There is a regular network of layers of appeal and review to ensure that local action conforms to national standards. This enables the system to be uniform and predable. This kind of hierarchy with active supervision of subordinates is to be distinguished from hierarchic systems in which there is a delegation of functions to subordinates who enjoy complete discretion within their jurisdictions.

5. Bureaucracy. In order to permit this uniformity, the system must operate impersonally, following prescribed procedures in each case and deciding each case in accordance with prescribed rules. In order to permit review, written records in prescribed form must be kept in each case.

6. Rationality. These rules and procedures are ascertainable from written sources by techniques that can be learned and transmitted without special non-rational gifts.

7. Professionalism. The system is staffed by persons chosen in accordance with testable mundane qualifications for this work. They are full-time professionals, not persons who engage in it sporadically or on the side. Their qualification comes from their mastery of the techniques of the legal system itself, not from possession of special gifts or talents or from their eminence in some other area of life.

8. Mediation. As the system becomes more technical and complex, there appear specialized professional intermediaries (as distinct from general agents) between the courts and the persons who must deal with them.

³This is, of course, a reformulation of Maine's distinction between law based on status and that based on contract. Ancient Law 141 (Oxford: World's Classics ed., 1931). Maine used "status" to refer only to those personal conditions derived from the family. By "transactional" I mean not merely the absence of determination by occupation of one of the forms of status found in law of persons, but more generally that legal rights and duties are not characterized by any factors (age, class, religion, sex, etc.) which proceed other than from the particular transaction.



9. Amendability. There is no sacred fixity to the system. It contains regular methods for revising rules and procedures to meet changing needs or to express changing preferences. Thus it is possible to have deliberate and measured innovation for the achievement of specific objectives.

10. Political control. Such a system is so connected to the state that it enjoys a monopoly over disputes within its cognizance. Other tribunals for settling disputes operate only by its sufferance and in its interstices and are liable to supervision by it.

11. Differentiation. The task of finding law and applying it to concrete cases is differentiated in personnel and technique from other governmental functions.

The present Indian system does not display all of these features in every detail; nor did the pre-British legal systems in India lack them entirely. But, as we shall see, they were, on the whole, absent before and they are now present in large measure. Generally, the development of national legal systems of this kind began in Europe at the very end of the 18th Century and spread over most of Europe in the early part of the 19th century.⁴ The British laid the foundations of such a system in India; it took shape in the mid-19th century and the work of consolidation and rationalization has continued since Independence in Indian hands. The Indian experience began only a short time after the European and can be seen as a phase in a world-wide transformation to legal systems of this 'modern' type. This sort of modernization continues today in both new and old states.⁵

The Role of Hindu Law Before the Coming of the British

In order to show the relation of Hindu law to the development of this modern Indian legal system, it is necessary to describe very briefly the legal situation in India before this system took shape. In the centuries preceding British rule in India, law was bewilderingly varied in sources and procedures. While rulers would ordinarily have regular courts at administrative centers, disputes in rural areas and even in cities would generally be settled not by royal courts but by panchayats or tribunals. These might be the tribunals of the locality, of the caste within which the dispute arose, or of guilds or associations of traders or artisans. Or, disputes might be taken for settlement to the panchayat of the locally dominant caste, or to large landholders, government officials or religious dignitaries. Some of these tribunals were standing bodies with more or less regular procedures; some were convened ad hoc. Some purported to administer some fixed body of law or custom; some extemporized. In some places and in some kinds of disputes, procedures were more regular (e.g., commercial disputes might be settled by the governing body of a market place). Many of these tribunals were not formal bodies of a sort that could be called governmental but were more in the nature of extended discussions among interested parties in which informal pressures could be generated to support the solution arrived at by negotiation or arbitration.⁶ In

⁴Monroe Smith, A General View of European Legal History (New York, 1927).

⁵"Modernization" here refers only to the development of the features mentioned above or sustained movement toward these features. Although in many cases the importation of "western" law seems to serve as the stimulus for such development, it need not necessarily imply "westernization."

⁶Cf. B. S. Cohn, "From Indian Status to British Contract," Journal of Economic History (Dec., 1961) 613-28 at 617.



some cases there was a right of appeal to royal courts, not often availed of, and there was the possibility of re-opening the matter if one could convene a larger and more widely representative body to consider it.⁷ In spite of the sanction and occasional support of government, there is little in the working of these tribunals that might be thought of as the regular and systematic application of fixed law by governmental bodies.

Hindu rulers traditionally enjoyed and sometimes exercised a general power of supervision over the tribunals of the various castes, guilds and villages.⁸ But while some adjudications might be enforced by governmental power, most depended on boycott and excommunication as the ultimate sanctions. There were no specialized enforcers; the community itself enforced the decrees of these tribunals. These sanctions, of course, could only be effective where the decision represented a high degree of community consensus.

In most cases the various tribunals would decide disputes in accordance with the custom or usage of the locality, caste, trade or family. Custom was not necessarily ancient and it was not unchangeable; it might be freshly minted for the occasion. The power of groups to change custom and to create new obligatory usage was generally recognized.⁹ Hindus generally recognized the prestige of the written Hindu law or dharmaśāstra (comprising a literature of several millennia)¹⁰ and its Brahman exponents. But the study of this refined "science of duty" was confined to Brahmins and it was directly applied mainly to Brahmins and other castes that subjected themselves to Brahmanic standards. Writing of the period from 800-1200 A.D., Derrett concludes that the śāstra was likely to predominate over customary law:

where Brahmins formed the court, where they acted as advisors on points of law, where the topic was obviously dealt with in the śāstra and customary law was silent or ambiguous, where parties to a dispute were

⁷J. D. M. Derrett, "Law and the Social Order in India before the Muhammadan Conquests," Journal of Economic and Social History of the Orient Vol. VII, Part I (1964) 73-120 at 95. Hereafter abbreviated as LSO. Cf. R. K. Mookerji, Local Government in Ancient India, 135 on the gradation of courts of appeal by the degree to which they represent the various interests, classes or castes of the community.

⁸In particular, admission of an excommunicated party to caste privileges was considered a royal prerogative. Derrett, LSO, 86. This prerogative was exercised by some Muslim rulers and by the British in 18th century Bengal. B. B. Misra, The Judicial Administration of the East India Company in Bengal 1765-1782 (Delhi, 1961) 34.

⁹Derrett, LSO 83, 88, 90. "Every conglomeration of people for a common purpose . . . were entitled to royal recognition and to the enforcement of freely agreed customs or conventions as laws" even where these customs did not agree with śāstra. "Hindu Law: The dharmaśāstra and Anglo-Hindu Law -- scope for further comparative study," 223. Zeitschrift für vergleichende Rechtswissenschaft Vol. 58, 199-245. Hereafter abbreviated as HL-DS.

¹⁰P. V. Kane, History of Dharmaśāstra (5 Vols. in 6, Poona, 1930-). For a brief account see U. S. Sarkar, Epochs in Hindu Legal History (Hoshiarpur, 1958).



governed by different customs, and in matters of a technical nature where the śāstra supplied learning unobtainable elsewhere.¹¹

In spite of its general prestige, dharmaśāstra was not a body of law which operated to override and displace local law. "The śāstra . . . had no obligatory force except insofar as jurisdiction was exercised by those who would naturally guide themselves by it. . . ."¹² Its tenor was "recommendatory, or at most directory, rather than mandatory."¹³ Indeed, the śāstra itself incorporates the widest tolerance of local and caste custom.¹⁴ The king is enjoined to recognize the binding authority of customs and usages on their respective classes and to lend his power to enforce them.¹⁵ His administration of justice is to be in accord with the customs of districts, towns and villages, castes and families, guilds, corporations and other groups.¹⁶

The fact that the dharmaśāstra was the only body of law that was written, studied and systematically cultivated combined with the widespread prestige of its Brahmin expositors, the patronage of royal authority and the striving for advancement to spread the śāstra to cover more groups on more legal topics. But while custom was thus gradually aligned in some respects with śāstric standards,¹⁷ the textual law was continuously reinterpreted to accommodate a variety of usages.¹⁸

The Moghuls and other Muslim rulers had royal courts in cities and administrative centers which exercised a general criminal (and sometimes commercial) jurisdiction and also decided civil and family matters among the Muslim population.¹⁹

¹¹Derrett, LSO 92. Derrett suggests there was if anything a decline of formal judicial activity and of juridical learning in the following centuries which witnessed a decline of Hindu political control and (immediately before the coming of the British) a breakdown of orderly government. "The Administration of Hindu Law by the British," Comparative Studies in Society and History Vol. 4, 10-52 (1961). Hereafter abbreviated as AHLB.

¹²Derrett, LSO 93.

¹³Id., at 119.

¹⁴P. V. Kane, Hindu Customs and Modern Law (Bombay, 1950) 22-26. Earlier stricter requirements that customs were only valid if they conformed with textual standards had been abandoned in the centuries preceding British rule. Derrett, AHLB 16 and HL-DS at 237.

¹⁵Kane, op. cit. note 14. Cf. A. B. Altekar, State and Government in Ancient India (3rd ed., Delhi, 1958) 249, 260.

¹⁶On the śāstric doctrine concerning which prevails in cases of conflict between śāstra and custom, see Kane, op. cit. 33-34. In spite of a split in authority, Kane says that gradually all usages, even of sudras and heterodox sects became enforceable by the king.

¹⁷Derrett, LSO at 96.

¹⁸Kane, op. cit. 35; Derrett, LSO 101.

¹⁹U. C. Sarker, Epochs in Hindu Legal History (Hoshiarpur, 1958) 252.



These courts operated according to Muslim law -- at least in theory, for the application of shari'ah was qualified by custom and royal decree, by corruption and by lack of professionalism and by arrangements allowing considerable discretion to the courts of first instance.²⁰ There was a hierarchy of courts and a right of appeal, but it seems that the activity of these higher courts fell short of any sustained and systematic supervision of the lower courts.

Under Muslim rulers Hindus were generally allowed their own tribunals in civil matters. Where these matters came before royal courts, the Hindu law was applied.²¹ The government's courts did not extend very deep into the countryside; there was no attempt to control the administration of law in the villages.²² Presumably the Hindu tribunals proceeded as before, except that whatever ties had bound these tribunals to governmental authority were weakened; there was no appeal to the royal courts.²³

In the Maratha kingdom, the most prominent Hindu regime at the arrival of the British, royal courts exercised a general oversight over a variety of local and caste tribunals. However, provisions for appeal were irregular, there being no "definite gradation" of courts.²⁴ The official courts were expected to abstain from any interference with local and caste custom.²⁵ While the king could modify the decisions of inferior tribunals, he was expected generally to follow and enforce their awards, allotting each final authority within its own bailiwick. Gune tells us that in deciding suits there was more emphasis on the reconciliation of the parties than on rules of law or regularity of procedure.²⁶ Where local officials administered criminal law, Hindu law books might be consulted in cases of moral and religious offenses; "otherwise the only rule seems to have been the custom of the country and the Magistrate's notice of expediency."²⁷

In pre-British India, then,²⁸ there were innumerable, overlapping local jurisdictions and many groups enjoyed one or another degree of autonomy in administering

²⁰ M. B. Ahmad, The Administration of Justice in Medieval India (Aligarh, 1941) 75.

²¹ Brahmins were recognized as the proper authorities to determine certain disputes. Derrett, AHLB 17.

²² Ahmad, op. cit. note 20 at 101-2.

²³ Sarkar, op. cit. note 19 at 250.

²⁴ V. T. Gune, The Judicial System of the Marathas (Poona, 1953) 63, 48, 81. For a description of the system under Ranjit Singh in the Punjab which also relied primarily on panchavats, had no professional pleaders, no single binding body of law, and no regular hierarchy of courts, see Sarkar, op. cit. note 19 at 278 ff, 255.

²⁵ Id., 69.

²⁶ Id., 128, 131.

²⁷ Id., 105. On the extent of conformity and divergence between caste usage (more accurately, stated caste rules) and the "leading principles of Hindu law" in the Maratha country at the time of the coming of the British, see Arthur Steele, The Law and Custom of Hindoo Castes. . . . London, 1868 (written 1826) xvii.

²⁸ For a concise summary of dispute-settlement and law-making at the time of the arrival of the British, see Derrett, AHLB 14 ff.



law to themselves. But it was not only the fragmentation of jurisdictions and the extensive delegation to local authorities that obstructed a modern legal system. The relative absence of written records, of professional pleaders and of appeals²⁹ made even local unification difficult. The existence of a refined and respected system of written law did not serve to unify the system in the way that national law did in the West. In Europe local law was absorbed into, and gradually displaced by, law promulgated by state authorities. Now only did the Hindu law lack the political conditions for unification; but the respective authoritativeness of governmental, sastric, and local components was not visualized in a way to provide either the techniques or the ideology of ruthless supercession of local law. The system allowed for change, but did not impose it; it allowed the old to remain alongside the new.³⁰ The relation of the "highest" and most authoritative parts of the legal system to the "lower" end of the system is not that of superior to subordinate in a bureaucratic hierarchy. It is perhaps closer to the relations that obtain between Paris designers and American department store fashions or between our most prestigious universities and our smaller colleges than to anything in our own legal experience. Instead of systematic imposition, there is a general diffusion by the filtering down (and occasionally up) of ideas and techniques, some conscious imitation and imitation of imitations, and movement of personnel.

The Formation of the Modern Legal System

Courts in the English style were early established in British settlements.³¹ From the outset, the British preferred to allow the Indian inhabitants to live by their own laws and to administer this law to themselves. As the territorial dominion of the British extended, it became apparent that the British would have to accept responsibility for the administration of justice to the inhabitants of their territories. The crucial decision, in retrospect, was to apply this law in the Government's courts, staffed with government servants, rather than to exercise a merely supervisory control over its administration by non-governmental bodies.³² Here the British took the decisive step toward a modern legal system,³³ initiating

²⁹Sarkar, op. cit. note 19 at 252.

³⁰Within the textual law itself, the relative authoritativeness of its different components was not visualized in "modern" terms. A digest or commentary attempting a comprehensive restatement of the law became one more authority (as many a reform group which sought to end caste ended up by becoming a caste). It took its place alongside the old, rather than superseding it.

³¹For an account of these courts, See Sir Charles Fawcett, The First Century of British Justice in India (Oxford, 1934).

³²On earlier attempts at a merely supervisory control over the administration of law, see Derrett, AHLE 22; B. B. Misra, The Judicial Administration of the East India Company in Bengal 1765-82 (Delhi, 1961) 30 ff.

³³The alternative is exemplified not only by earlier Indian law, but by such arrangements as the millet system of the Ottoman empire, under which each religious community was required to administer its own law to itself -- a system which continues in some degree in parts of the Middle East today.



a process which might be called the "expropriation" of law.³⁴ This expropriation, making the power to find, declare and apply law a monopoly of government, came about in piecemeal fashion, in slightly different ways and at different times in different places. But the general movement is the same. Three distinctive, if overlapping, stages can be discerned in the development of the modern legal system. The first, the period of initial expropriation, can conveniently be dated from Warren Hastings' organization in 1772 of a system of courts for the hinterland of Bengal.³⁵ This period is marked by the general expansion of governments' judicial functions and the attrition of other tribunals, while the authoritative sources of law to be used in these courts were isolated and legislation initiated. The second period which begins about 1860 is a period of extensive codification of the law and rationalization of the system of courts, while the sources of law become more fixed and legislation becomes the dominant mode of modifying the law. This period lasts until Independence, when there is a further consolidation and rationalization of the law and the development of a unified judicial system over the whole of India.

During the first period of "initial expropriation," dual systems of courts were established with jurisdiction over all civil, criminal and commercial matters. In the presidency towns there were Royally-chartered Supreme Courts with English judges, drawn mostly from the bar, British-trained barristers, English procedure and a great deal of English law. In the back country the East India Company's courts, hierarchically arranged with Sudder (chief) courts at the top, were staffed by judges drawn from the civil service rather than the bar and had Indian pleaders, less formal procedure and less English law.

The law applied in these courts before 1860 was extremely varied. Parliamentary charters and acts, Indian legislation (after 1833), Company Regulations, English common law and ecclesiastical and admiralty law, Hindu law, Muslim law, and many bodies of customary law were combined in a bewildering array.³⁶ In the Presidency towns, a version of English law prevailed but dealings among Hindus and Muslims were ruled by their respective laws (or in case of conflict the law of the defendant). Hastings' plan of 1772 for back-country courts provided that:

³⁴Cf. Weber's description of the development of capitalist enterprise by the gradual expropriation of individual producers and the development of the modern state by the "expropriation of the autonomous and 'private' bearers of executive power who stand beside [the prince]. . . ." "Politics as a Vocation," Gerth and Mills, From Max Weber: Essays in Sociology (New York, 1958) 83.

³⁵The development and operation of this system is described in B. B. Misra, op. cit note 32 and The Central Administration of the East India Company 1773-1834 (Manchester, 1959) Chaps. V, VI; Atul Chandra Patra, The Administration of Justice under the East-India Company in Bengal, Bihar and Orissa (Bombay, 1962). Early administration of criminal law is covered in N. Majumdar, Justice and Police in Bengal 1765-1793 (Calcutta, 1960).

³⁶William H. Morley, An Analytical Digest of all the Reported Cases. . . . (London, 1850, 2 Vols.) Vol. I, Introduction, esp. xxii, xcvi; G. C. Rankin, Background to Indian Law (Cambridge, 1946) Chapter I, X, XI; Atul Chandra Patra, op. cit note 35, Chapter VIII; Sir Courtenay Ilbert, The Government of India (2d ed., Oxford, 1907) Chapter III.



In all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mohamadans and those of the Shaster with respect to the Gentoos [Hindus] shall invariably be adhered to.³⁷

Although the list differed in some particulars from place to place and time to time, this provision expressed the fundamental and persisting British policy that in matters of family law, inheritance, caste and religion, Indians were not to be subjected to a single general territorial law. Hindus and Muslims were to be governed by their "personal law," i.e., the law of their religious group.³⁸ The Hastings' regulation went on to specify that in other cases the judges should act "according to justice, equity and good conscience." This puzzling formula, whatever its original meaning,³⁹ was the medium for the uneven application of some indigenous law and for the importation, sometimes uncritical, of a great deal of English law.

During this period there were numerous attempts to reorganize and reform the courts and to systematize and reform the law.⁴⁰ Many changes were made with an eye to increased administrative efficiency and a few reforms were enacted. But the latter (including some reforms which changed Hindu law) were on the whole isolated measures proceeding from British humanitarianism rather than from any general scheme of law reform. The first Law Commission, appointed in 1833, proposed the codification of Hindu and Muslim law into a unified territorial law -- a proposal rejected by the Second Law Commission in 1853. There was no major progress toward simplifying and systematizing the law until the Crown took over the governing of India from the East India Company in 1858.

During the quarter-century following the takeover by the Crown, we have the major period of codification of law and consolidation of the court system. Beginning with the Code of Civil Procedure in 1859, the Code of Criminal Procedure (1860), and the monumental Indian Penal Code (1861), a series of Codes were enacted, based more or less on English law, which were with minor exceptions applicable throughout British India and which supplanted all prior law.

[C]odification was carried out on the grand scale, not merely with a view to putting into form a system of law which was already in force, but to lay down a rule of decision where there seemed to be none, or where different rules were competing for the same ground.⁴¹

³⁷ Regulation II of 1772, Art. 27. "Succession" was added in 1781 and is generally treated as a "personal law" subject.

³⁸ On the personal law of persons neither Hindu nor Muslim, see Rankin, *op. cit.* note 36 Chap. II.

³⁹ See J. D. M. Derrett, "Justice, Equity and Good Conscience" in J. N. D. Anderson (ed.), *Changing Law in Developing Countries* (London, 1963) 114-53.

⁴⁰ Morley, *op. cit.* note 36, Vol. I, Introduction; Eric Stokes, *The English Utilitarians and India* (Oxford, 1959) Chapter 3. A brief and useful survey of the period after 1833 may be found in S. Desika Char, *Centralized Legislation: A History of the Legislative System of British India from 1834 to 1861* (London, 1963) 278-92. Elbert, *op. cit.* note 36 provides a useful compendium of the statute law.

⁴¹ Rankin, *op. cit.* note 36 at 20.



By 1882 there was virtually complete codification of all fields of commercial, criminal and procedural law.⁴² Only the "personal laws" of Hindus and Muslims were exempted.⁴³ But while Hindu and Muslim laws previously were applied to a variety of topics besides the "listed" ones, they were now confined to the "personal law" matters (family law, inheritance, succession, caste, religious endowments).⁴⁴ At the same time the dual system of courts was abolished and the jurisdictions of the Supreme Courts and the Sudder courts united in a single high court in each province (1861). A unified hierarchy of courts now applied the same law to all parts of the province.⁴⁵

The bringing of common law to India, culminating in the codes, was not the mere imposition of English law. Although large masses of British law were borrowed and applied uncritically, the courts were often at pains to discard that which was unsuitable to Indian conditions. Specifically Indian problems stimulated some new developments of common law.⁴⁶ The Codes themselves are not a mere borrowing of English law, but also a significant departure from it. They were based more or less upon English law, but English law simplified, clarified, refined, pruned of localisms and historical anomalies. The common law as a technical lawyer's law requiring trained professional judges and lawyers did not commend itself for easy transplantation. At the time the common law was itself undergoing a process of reform and rationalization in England. The codifiers wanted law that could be administered in courts staffed by men with little legal training and that could be applied in outlying places without extensive law libraries.⁴⁷ Indeed, the Codes were intended to forestall the indiscriminate borrowing of English law.⁴⁸ In the Codes, the common law, built up by the slow accretion of judicial

⁴²The codes and useful commentary explaining the departures from prior law may be found in Whitley Stokes, The Anglo-Indian Codes (2 Vols., Oxford, 1887).

⁴³While relinquishing schemes for the formulation of a uniform law in the personal law subjects, the British did pass codes creating a general law in subjects like trusts, succession, etc. for all persons not covered by a body of personal law. It was open to Hindus and Muslims to attract this body of law to themselves by registering a marriage in accordance with the provisions of the Special Marriage Act, 1872 (this required a renunciation of their religion; this requirement was softened in 1923 and removed in 1954).

⁴⁴With the exception of a few isolated matters such as the rule of damdapat (limitation on collection of interest) and rules relating to hundis (customary bills of exchange).

⁴⁵Earlier provisions for appeal from Indian courts to the Judicial Committee of the Privy Council in London had been used since 1799, but it was only in the latter part of the century that the Privy Council served to introduce uniformity into Indian law.

⁴⁶Some examples of "Indian common law" can be found in M. C. Setalvad, The Common Law in India (London, 1960) 59-60.

⁴⁷K. Lipstein, "The Reception of Western Law in India," International Social Science Bulletin, Vol. IX (1957) 85-95 at 91.

⁴⁸Rankin, op. cit. note 36 at 20. It is generally acknowledged that the most successful codes are those that depart most from common law (in the strict sense) -- e.g., the Indian Penal Code; those which have proved least successful are those which are largely compendia of common law rules -- e.g., the Evidence Act. realpatidar.com



precedent over centuries, was "stript of its technicality and local peculiarities, shortened, simplified, made intelligible and precise. . . ."49

The Codes do not represent any fusion with indigenous law;⁵⁰ there is no borrowing from Hindu, Muslim or customary law, though there is occasional accommodation of local rules and there are adjustments and elaborations of the common law to deal with kinds of persons and situations and conditions found in India.⁵¹ What emerged eventually was a uniquely Indian common law, built on judicial elaboration of systematic codes and a unique style of being common law judges.⁵² In sum, in the process of transferring the common law to India, it was transformed both by reference to "universal" standards and by being designed for Indian conditions.

The Transformation of Indigenous Law

What happened to indigenous law as a result of the formation of this modern legal system? First, its administration moved from "informal" tribunals into the government's courts; second, as we have seen, the applicability of indigenous law was curtailed; third, the indigenous law was transformed in the course of being administered by the government's courts.

The most striking impact of the provision of governmental courts was the shift of dispute-settlement from local tribunals (and local notables) to the government's courts. Nineteenth century (and later) observers speak of a flood of litigation, sometimes with the implication that these disputes would have been peaceably settled or indeed would never have arisen without the availability of official courts. In the absence of information about the quantity of disputes and litigation in traditional India, it seems reasonable to regard most of this litigation as the mere transfer of old disputes to new tribunals.⁵³ These new

⁴⁹Whitley Stokes, The Anglo-Indian Codes (Oxford, 1887) Vol. I, 71.

⁵⁰See the observation of Lord Bryce that there was no Indian participation in the process of codification and that the codes diverged from the English law about as they might have in a code for home use. "The Extension of Roman and English Law throughout the World," Studies in History and Jurisprudence (Oxford, 1901) 72-123 at 107, 117.

⁵¹Special adaptations of common law for Indian conditions include e.g., in the criminal law the elaborate protection of religious places and feelings, the different treatment of bigamy, adultery, false evidence and defamation; in contract law the treatment of duress and agreements in restraint of trade. See Lipstein, op. cit. note 47 at 92 ff.; and in Revista del [Barcelona] Instituto de Derecho Comparado, No. 8-9, 74-5; K. Krishna Menon, "English Law in India: the Law of Transfer of Property" in ibid. at 90-101. Cf. S. Ramaswamy Iyer, "The Influence of the English Law on the Indian Law of Torts" in ibid. 82-89 at 84 ff. for the contrast with borrowing in an uncodified field.

⁵²The Indian-style common law has spread with the codes, which have served as a model for legislation in other parts of the Commonwealth and elsewhere.

⁵³This supposition is compatible with observations of more recent instances of disputes moving from traditional to governmental tribunals. See the examples referred to in Frederick John Shore, that in fact British rule decreased the number of tribunals available. Notes on Indian Affairs (2 Vols. London, 1837) Vol. II, 189.



tribunals and their strange methods had a powerful allure. Maine speaks of the "revolution of legal ideas" inadvertently produced in the very course of attempting to enforce the usages of the country. This revolution, he found, proceeded from a single innovation -- "the mere establishment of local courts of lowest jurisdiction" in every administrative District.⁵⁴ The availability of these courts with their power to compel the attendance of parties and witnesses, and above all, with their compulsory execution of decrees, opened the way for "the contagion . . . of the English system of law."⁵⁵

The common law courts undertook to deal with the "merits" of a single transaction or offense, isolated from the related disputes among the parties and their supporters and omitting the "fireside equities" and qualifying circumstances known to the indigenous tribunal. In accordance with the precept of "equality before the law" the status and ties of the parties, a matter of moment to an indigenous tribunal, were deliberately ignored. And, unlike an indigenous tribunal which sought a compromise or face-saving solution acceptable to all parties, the government's courts dispensed a clear-cut "all or none" decision. Decrees were enforced by external force and were not subject to the delays and protracted negotiations which abounded when decisions were enforced by informal pressures. Thus "larger prizes" were available to successful litigants and these winnings might be grasped independently of the assent of local opinion. The new courts not only created new opportunities for intimidation and harassment and new means for carrying on old disputes, but they gave rise to a sense of individual right not dependent on opinion or usage and capable of being actively enforced by government even in opposition to community opinion.

Traditional tribunals still functioned, though certain subjects (e.g., criminal law) were withdrawn from their purview.⁵⁶ On the whole, these tribunals lost whatever governmental enforcement their decisions had previously enjoyed. The caste group was now treated as a private association. While it thus enjoyed an area of autonomy, it no longer could invoke governmental enforcement of its decrees.⁵⁷ At the same time, the sanctions available to the indigenous tribunals declined in force. The new opportunities for mobility, spatial and social, provided by British rule not only increased transactions between parties beyond the reach of traditional sanctions, but made outcasting and boycott less rearsome. With its own sanctions diminished, its ability to invoke governmental support limited and the social

⁵⁴Sir Henry Maine, Village Communities in the East and West (7th ed., London, 1895) 70-71. Cf. the statement by Lord Moira (Warren Hastings) quoted in B. B. Misra, Central Administration 260.

⁵⁵Maine, op. cit., 74. Cf. Derrett, AHLB 18.

⁵⁶Not only panchayats but the local notables were thus restricted. See e.g., Sec. 66 of Bengal Reg. VII of 1793 which prohibits Zemindars from taking cognizance of matters within the jurisdiction of the courts.

⁵⁷The government's courts at first exercised a plenary jurisdiction to review the proceedings of caste tribunals. This was withdrawn (in Bombay in 1827 and) throughout British India by the Civil Procedure Code of 1859, Section 9. The Courts would intervene only in matters involving "civil or property rights" and then only to see that procedural fairness was present. See "Law and Caste in Modern India," Asian Survey, Vol. III, 544-559 (1963); L. T. Kikani, Caste in Courts (Rajkot, 1912).



relations necessary for its effectiveness disrupted, the indigenous tribunals declined as the government courts flourished.⁵⁸

The movement of disputes into the government courts has not been definitively charted. We might visualize it, borrowing Bailey's term, as a "moving legal frontier."⁵⁹ At first the village lies beyond the reach of the modern legal system, happily ruled by its traditional tribunals according to its customary rules.⁶⁰ With the impingement of new regulation and the arrival of new forms of wealth and power from the outside, sooner or later some party in the village finds it both feasible and advantageous to resort to the government's courts for what it cannot obtain from village justice.⁶¹ Other parties must defend themselves in court. As more learn to use the official courts, the authority of village tribunals is displaced. Over time the modern system encroaches on the traditional system: court law replaces village law on more topics of law for more groups over more territory.⁶² With this "expropriation" of independent "estates" the government's monopoly on making, finding and applying the law is extended.

It was early acknowledged that Indians should be ruled by their own laws. Hastings' plan, which provided the model for the other mofussil systems, set out to apply indigenous law. The British assumed that there was some body of law somehow comparable to their own, based on authoritative textual materials to be applied by officials according to specified procedures to reach unambiguous answers. However, there was no single system in use but a multiplicity of systems; and within these there was often no fixed authoritative body of law, no set of binding precedents, no single legitimate way of applying or changing the law. Yet these British assumptions and expectations about Hindu law had a powerful effect upon it and ultimately proved to be self-fulfilling prophecies.

⁵⁸See B. B. Misra, Central Administration 259-60. However, these tribunals remained effective to a greater extent in many of the princely states, where they enjoyed "traditional" relations with the government.

⁵⁹Cf. F. G. Bailey, Caste and the Economic Frontier (Manchester, 1957), 4-5.

⁶⁰This is not to concede that villages were typically the "self-sufficient village republics" of legend. Cf. Marriott's observation that local customary arrangements in northern India "turn out to be not merely isolated indigenous developments but also reflexes of general state policy." "Little Communities in an Indigenous Civilization," Village India (Chicago, 1955) 186 ff.

⁶¹See Bailey, op. cit. 262 ff; B. S. Cohn, "The Changing Status of a Depressed Caste," in M. Marriott, Village India, 66; A. Beals "Interplay among Factors of Change in a Mysore Village," in ibid., at 90. Cf. Philip Woodruff's observation that "an intimate system of justice, in which everyone concerned knows the facts, can hardly stand side by side with one formal and remote, by which the malefactor has a good chance of winning his case. A man who knows he is in the wrong will always take his case to the formal court." The Men Who Ruled India: The Founders (London, 1953). But it is not only those "in the wrong" but also those who, because of their position in the village, are not likely to get a favorable hearing, who may be attracted by the remote and formal court.

⁶²This does not imply that traditional norms and concerns are displaced by official ones. On the contrary, it appears that these traditional attitudes outlast traditional legal practice and are responsible for the inspired manipulation of "modern" law for purposes foreign to the law. Cf. the observation that most Indian court cases are "fabrications to cover the real disputes." B. S. Cohn, "Law and Change in North India," Economic Development and Cultural Change, Vol. VIII, 79-93 at 90, realpatidar.com



In their search for authoritative bodies of law, the British made collections and translations of ancient texts and recent commentaries. However Indian law proved strangely elusive.⁶³ Maine speaks of the "vast gaps and interspaces in the Substantive Law of India."⁶⁴ India was "a country singularly empty of law."⁶⁵ In the written śāstra "large departments of law were scarcely represented."⁶⁶ It was soon recognized that śāstra was only part of the law and that in many matters Indians were regulated by less formal bodies of customary law. But even the customary law was not sufficient. For when custom was recorded and the quasi-legislative innovative role of the tribunals that administered it restricted, it did not supply "express rules in nearly sufficient number to settle the disputes occasioned by the increased activity of life and the multiplied wants which result[ed] from . . . peace and plenty. . . ."⁶⁷ The need to fill the felt gaps was ultimately to lead to statutory codification on the basis of English law. But in the meantime courts, empowered to decide cases in accordance with "justice, equity and good conscience" filled the interstices of śāstra and custom with "unamalgamated masses of foreign law."⁶⁸ Although there was some attempt to draw the most suitable rule from other sources,⁶⁹ in most cases the judges were inclined to assume that English law was most suitable.⁷⁰

⁶³ See the plaintive assertion by Hunter in 1864 that "We are conscientiously trying to rule according to native usages and tenures; but no one can pronounce with certainty as to what these usages and tenures are." W. W. Hunter, Annals of Rural Bengal, (7th ed., London, 1879) 371.

⁶⁴ Sir Henry Maine, "Minute of 1st October, 1868," Minutes by Sir H. S. Maine 1862-69 (Calcutta, 1890) 209.

⁶⁵ Op. cit. at 225 (Note of 17th July, 1879).

⁶⁶ Village Communities at 51. Derrett attributes this partly to unwillingness to find many fields of law that were there and to supposing that Brahmanical law was the whole law. "Sir Henry Maine and Law in India," [1959] The Juridical Review 40-55 at 48 ff. His observation that jurists were disinclined to elaborate on commercial matters since they were not dealt with in Royal courts, but among commercial and professional guilds in which jurists were not habitually consulted. LSQ 109-10.

⁶⁷ Village Communities at 75.

⁶⁸ Id., at 76. On the similar infiltration of Roman law in Europe, filling the gaps in the customary law, see F. H. Lawson, A Common Lawyer Looks at the Civil Law (Ann Arbor, 1953) 25 ff.

⁶⁹ Derrett, "The Role of Roman Law and Continental Laws in India," Zeitschrift für Ausländisches u. intern. Privat-recht (RazexZ.) 657-85 (1959); and in Anderson (ed.), op. cit., note 39.

⁷⁰ Eventually it was held that although English law was not binding on mofussil courts, they ought to look to English law. Vardan Seth Sam v. Luckpathy, 9 M.I.A. 307; Wachala v. Sekh Morluddin, 14 I.A. 89 (1887). For a scathing commentary on the inability of English lawyers to apply anything other than English law, see Shore, op. cit. note 53, I, 301. On the basis of his observations with judicial treatment of African customary law, William Twining hypothesizes that "no matter what law they are meant to apply, judges tend to apply the law they know." The Place of Customary Law in the National Legal Systems of East Africa: Lectures Delivered at the University of Chicago Law School in April-May 1963 (Chicago, 1964) 31.



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Even where Indian rules were available, their application by the British transformed them.⁷¹ Mere restatement in English legal terminology distorted the Hindu and customary rules.⁷² English procedure curtailed some substantive rights and amplified others.⁷³ The British insisted upon a clarity, certainty and definiteness of a kind foreign to Hindu tradition.⁷⁴ Neither the written or the customary law was "of a nature to bear the strict criteria applied by English lawyers."⁷⁵ Rules seemed vague and requiring of definition and this was accomplished by English methods. The mere process of definition had the effect of creating rights of a kind that did not previously exist.⁷⁶ Comparing the effect of English legal method in the Supreme Courts and the Sudder Courts, Maine observed that:

At the touch of the Judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law-books. Under the hand of the judges of the Sudder Courts, who had lived since their boyhood among the people of the country, the native rules hardened and contracted a rigidity which they never had in real native practice.⁷⁷

One of the remarkable and unanticipated results of the British administration of Hindu law was the elevation of the textual law over lesser bodies of customary law. The sources of personal law were assumed to be not the customary law that prevailed among most Hindus (and Muslims) on most matters, but the highest and most authoritative bodies of textual law.⁷⁸ It was assumed that the Hindu law could be ascertained from sacred books. Hastings' plan "took Orthodox Brahmanic learning as the standard of Hindu law."⁷⁹ It was later acknowledged that according to the

⁷¹On the alternative developments arising out of different systems of administering Hindu law by the Portuguese, French, and Dutch in India, see Derrett, AHLB 20, 21-22.

⁷²Derrett, AHLB 41.

⁷³Id., 40.

⁷⁴Derrett, "Sanskrit Legal Treatises Compiled at the Instance of the British," Zeitschrift für vergleichende Rechtswissenschaft Vol. 63, 72-117 at 112. (1961) Hereafter abbreviated as ST.

⁷⁵Village Communities, 37.

⁷⁶Id., 167.

⁷⁷Id., 45.

⁷⁸This proclivity is hinted in the Hastings regulation, quoted p. 9 supra, with its references to the "Koran" and "the Shaster." This was amended to read "Mahomedan Laws" and "Hindoo laws" by Sec. 15 of Reg. IV of 1793, but the same spirit remained. No systematic attempt was made in Bengal to collect or record customary law.

⁷⁹Derrett, ST 80.



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Hindu law, where there was a conflict between custom and śāstra, the custom overrode the written text,⁸⁰ nevertheless the texts were elevated to a new supremacy over custom. While some more widespread and long-standing customs gained recognition, "the most distinct effect of continued judicial construction . . . has been . . . greatly to extend the operation of semi-sacred collections of written rules . . . at the expense of local customs which had been practiced over small territorial areas."⁸¹

While the British courts may have strengthened some customs by impeding the traditional methods by which orthodox standards spread to new groups,⁸² the rules of evidence provided the mechanism for the disappearance of legal effectiveness to much customary law. Custom was unwritten and therefore difficult to prove in court. Yet the British courts, with their heritage of common law hostility to local custom, applied requirements for proving the existence of a custom that was onerous to Indian litigants. To prevail over the written law a custom must be "proved to be immemorial or ancient, uniform, invariable, continuous, certain, notorious, reasonable (or not unreasonable), peaceable, obligatory, and it must not be immoral nor opposed to an express enactment. . . . or to public policy."⁸³ The difficulties in meeting these requirements combined with the general assumption that Hindus were ruled by dharmaśāstra to extend the śāstric rules to many groups which had previously been ruled by their own customs.⁸⁴

Even where an explicit attempt was made to preserve customary law, the śāstric law advanced over it.⁸⁵ Where custom recorded for the purpose of applying it in

⁸⁰In the leading case of Collector of Madura v. Moottoo Ramalinga, 12 M.I.A. 397, 436 (1868), the Judicial Committee of the Privy Council observed that "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

⁸¹Maine, 208; Derrett, ST 101; A Gledhill, "The Influence of Common Law and Equity on Hindu Law Since 1800," International and Comparative Law Quarterly Vol. 3, 576 at 578 (1954).

⁸²Derrett, HL-DS 237.

⁸³Kane, op. cit. note 10, 44. These requirements were not all invoked in every case. For the Courts' treatment of customs see Kane, op. cit. and S. Roy, "Customs and Customary Law in British India," (Calcutta, 1911). On the extent of conformity and divergence between caste rules and "the leading principles of the Hindu system of law" in the Deccan at the time of British takeover see Steele, op. cit. note 27, xvii.

⁸⁴The most striking elaboration of this view is found in the works of J. H. Nelson: A View of the Hindu Law as Administered by the High Court of Judicature at Madras (Madras, 1877); A Prospectus of the Scientific Study of Hindu Law (London, 1880); Indian Usage and Judge-made Law in Madras (London, 1886). See Derrett, "J. H. Nelson: A Forgotten Administrator Historian of India," in C. H. Philips (ed.), Historians of India, Pakistan, Ceylon (London, 1961). Similar developments in the elevation of Roman over customary law in Europe are described in Smith, op. cit. note 4 at 35; on the similar role played there by rules of evidence, see Bryce, op. cit. note 1 at 106. While the number of topics ruled by dharmaśāstra has been restricted, the portion of the population ruled by it continues to increase even today under the rubric of "Hinduization of Tribals."

⁸⁵See Derrett, AHLB 29.

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the courts, it was changed in the process of recording it.⁸⁶ From a body of orally-transmitted precepts and precedents, subject to variable interpretation and quasi-legislative innovation at the discretion of village notables or elders, it becomes a body of fixed law to be construed by a professional court. Variable sanctions, imposed with an eye to the total situation of the parties, are replaced by the compulsory and drastic execution of the court's decrees. Judicial enforcement of custom rigidifies it and strips it of its quasi-legislative character;⁸⁷ official courts are reluctant to permit the creation of new binding custom.⁸⁸

Customary law then, was rigidified, restricted in scope and replaced by dharmasastra. What was the effect of the courts on sastric law? To ascertain the Hindu and Muslim law, the courts appointed law officers⁸⁹ -- Muslim Moulavis and Brahmin Pundits -- to select and interpret the relevant portions of the Hindu and Muslim law for the English judges. At the same time they set about collecting and translating authoritative books in the hope of making the Hindu law more accessible and certain. Dissatisfaction with the work of the law officers⁹⁰ and the growth of a body of translated texts, and digests and manuals prepared by the British (as well as a growing body of precedent from the courts themselves), led eventually to the elimination of the law officers as intermediaries between the courts and the Hindu law. With the general reorganization of the legal system in the 1860's, the law officers were abolished and the common law judges undertook to administer the law directly from the existing corpus of materials. Derrett observes that "the dharmasastra, as a living and responsible science died when the courts assumed full judicial knowledge of the Hindu law in 1865. . . ." ⁹¹

Derrett tells us that the "death-sickness" began when, in their quest for "clarity, certainty and finality in terms foreign to Hindu tradition,"⁹² the British attempted to treat Hindu law as if it could be made to assume a fixed form.⁹³ They insisted on a certainty and consistency alien to Hindu jurisprudence, which depended on expansive judicial discretion. ". . . [T]he sastra . . . offered the judge discretion, not only in choice of a rule of law from permissible alternatives, but also in manipulating the judicial procedure, e.g., in the admission of witnesses, etc."⁹⁴ But while such discretion and flexibility was necessary to the working of the traditional system, it appeared an intolerable deficiency to the

⁸⁶ In the Punjab a custom was regarded as the primary rule of decision on certain specified matters. Rattigan, Digest of Punjab Customary Law. But even here, custom was recorded and its administration becomes almost indistinguishable from state and case law. See, e.g., Jai Kaur v. Sher Singh, A.I.R. 1960 S.C. 1118.

⁸⁷ Cf. Lawson's observation that "Where there was not actual supercession, very often new techniques were introduced from Roman law and applied to old customary elements in such a way as to transform them almost completely." Op. cit., note 68 at 19.

⁸⁸ For some recent examples, see Daivanai Achi v. Chidambaram, A.I.R. 1954 Mad. 657; Sankaram Namboodiri v. Modhavan, A.I.R. 1955 Mad. 579; V. V. Giri v. D. Sura Dora, A.I.R. 1959 S.C. 1318.

⁸⁹ Rankin considers this an adaptation of the Muslim system of having a Mufti to expound the law for the benefit of the Kazi who administered it. Op. cit., note 36 at 5.

⁹⁰ See Rankin, op. cit. note 36 at 139 ff. ⁹¹ Derrett, ST 94. ⁹² Id., 112.

⁹³ Id., 94. ⁹⁴ Id., 76.



British, who "had no means of inserting themselves into the tradition which would have enabled sound discretion to be exercised."⁹⁵

In their effort to make Hindu law more uniform, certain, and accessible to British judges and to check the discretion of the pandits, the courts relied increasingly on translations of texts, digests, manuals, and the translations of texts, and on their own precedents. Regard for precedent as such was foreign to the Hindu system.⁹⁶ Introduction of the rule of stare decisis diminished the flexibility of Hindu law by ruling out innovations to meet changes in community sentiment.⁹⁷

Earlier, śāstra had changed and developed by successive commentaries and had maintained its flexibility by its complex and discretionary techniques of interpretation. British administration not only dissipated these techniques but narrowed the selection of authoritative texts. Courts were not to consult the whole of śāstric science, but only those commentators accepted in the locality,⁹⁸ a view which led to the elaboration of partially artificial "schools" of Hindu law.⁹⁹ Any further development by commentary and redaction was impeded.¹⁰⁰

[A]s the influence of the pandit gradually wanes in the courts we see the latter coming to rely more and more on the older, more narrowly defined dharmasāstra works and less and less on the miscellaneous and more recent works which the good pandit would frequently rely upon. The pandit as a professor of a living science was rejected for the more or less dead treatises which would head the pandits' list of references.¹⁰¹

With its innovative technique stripped away, śāstric law, like customary law, became more rigid and archaic¹⁰² as well as more uniform and certain. Yet the new possibilities of growth by judicial precedent and by legislation provided new means of growth and development.¹⁰³

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⁹⁵ Id., Cf. AHLB 33; Morley, op. cit. note 36, clxxxviii ff. ⁹⁶ ST 83. ⁹⁷ AHLB 48.

⁹⁸ Collector of Madura v. Moottoo Ramalinga, op. cit. note 80.

⁹⁹ The applicable law in each province is not local law, "It becomes the personal law, and a part of the status of every family which is governed by it. Consequently where any such family migrates to another province, governed by another law, it carries its own law [as of the time of migration] with it, including any custom having the force of law." J. D. Mayne, Treatise on Hindu Law and Usage (11th ed., Madras, 1953) 90.

¹⁰⁰ Cf. Maine's observations of the relatively greater speed and sweep of legal change by learned commentary as compared to case law. Village Communities 46-7.

¹⁰¹ Derrett, ST 99.

¹⁰² A striking instance of this is to be found in the increased emphasis on the varnas, or four great classes into which Hindu society is theoretically divided by the śāstric texts. Varma distinctions receive scant attention from the courts during the early years of British rule, but become a major factor in the administration of Hindu law after the courts undertake to administer it without intermediaries and directly /from the texts.

¹⁰³ Judicial and legislative modifications increased powers of alienation, enhanced separate rights in property, improved the position of women. For a summary and evaluation of these developments, see Sarkar, op. cit., 366-90; Gledhill, op. cit.



The Impact of the Modern Legal System

Let us consider some of the effects on Indian society of this modern legal system with its regular hierarchies of courts applying codified English law and rationalized indigenous law. We noted before the spread of a sense of individual right independent of local usage or opinion and enforceable by reference to standards and agencies beyond the locality and the group. The new system provides new avenues of mobility and advancement within Indian society.¹⁰⁴ There are new weapons for carrying on conflict, acquisition and claims for status. Powerful persons and groups on the local scene have new weapons for intimidating and harassing their opponents. But the local underdogs can now carry the fight outside the local arena by enlisting powerful allies elsewhere. Persons and property are freed from hereditary prescriptions, making possible a wider range of "market" transactions.

The legal system also provides new channels for the dissemination of norms and values from governmental centers to towns and out to villages. The legal system is a hierarchical network radiating out from the cities, in which authoritative doctrine flows out from governmental centers. By the disposition of governmental power in their enforcement and by the prestige of urban and official centers, elements of this doctrine may be powerfully recommended. New methods of group activity and new images of social formation are presented.¹⁰⁵

The modern legal system may be viewed as an important unifying element. Previously there were wider networks of marriage, ritual activity, pilgrimage, economic and military activity, but until the advent of the modern system, law and justice were in good part purely local concerns.¹⁰⁶ Today, while India has no single nationwide system of caste, kinship, religion or land-tenure, there is an all-India legal system which handles local disputes in accordance with uniform national standards. This is not merely a common textual tradition but a machinery for insuring that this tradition is applied in all localities in accordance with nationally-prescribed rules and procedures rather than dissolved into local interpretations.

With this system goes what we might call an all-India legal culture. Its carriers are all who are connected with the courts but primarily the numerous class

¹⁰⁴For an example of economic and political advance through manipulation of court offices, see B. S. Cohn, "The Initial British Impact on India: A Case Study of the Benares Region," Journal of Asian Studies XIX, 418-31 (1960). Cf. instances of social and religious mobility by use of lawsuits to elicit official certification of higher varna status.

¹⁰⁵E.g., see Wm. McCormack, "Lingayats as a Sect," Journal of the Royal Anthropological Institute, Vol. 93, part 1, 59-71 at 66 ff. on the profound influence of legal concepts on the development of a Lingayat culture. Cf. Maine's observation that traditionally whatever the sovereign commands has been regarded as custom and on the readiness of Indians to abandon traditional usage for tangible advantage. Village Communities at 9, 38.

¹⁰⁶See Cohn, "Some Notes on Law and Change in North India," 88.



of lawyers.¹⁰⁷ With their skills in manipulating the legal system, they serve as links or middlemen between official centers and rural places, disseminating official norms,¹⁰⁸ rephrasing local concerns in acceptable legal garb, playing an important role in devising new organizational forms for forwarding local interests (e.g., caste associations, political parties, economic interest groups).¹⁰⁹ In spite of differences of region, language, caste and religion, they share a common legal culture and they are able to put this culture at the service of a wide variety of local interests. In a situation where local concerns and interests get expression by representation at centers of power, rather than in the "traditional" way of enjoying a sphere of autonomy, the lawyers are crucial agents for the expression of local and parochial interests at the same time that they rephrase these in terms of official norms. Thus the modern legal system provides both the personnel and techniques for

¹⁰⁷ In absolute numbers, India has the second largest legal profession in the world (after the United States). In proportion to its population there are fewer lawyers in India than in Western common law countries, but many more than in other "new states." The Indian figures are in the same range as many continental "civil law" countries. (In these comparisons the Indian figures are somewhat understated, since the proportion of children is higher in the population of India than of the wealthier countries.) But a rough idea may be gathered from the following figures, which represent the number of persons per lawyer in selected countries:

United States (1960)	728 ^a
Canada (1961)	1,366 ^a
Italy (1957)	1,601 ^a
Great Britain (1959)	2,105 ^a
West Germany (1958)	3,012 ^a
India (1952)	4,920 ^b
Egypt (1964)	5,768 ^c
France (1958)	5,769 ^a
Japan (1960)	14,354 ^a
Nigeria (1964)	22,765 ^c

^a von Mehren, Arthur Taylor (ed.), Law in Japan (Cambridge, 1963).

^b Report of the All-India Bar Committee (Delhi, 1953) 72-3).

^c International Directory of Bar Associations, Commonwealth Library, American Bar Foundation, (in preparation).

¹⁰⁸ Lawyers not only "control" their clients, but also the officials with whom these clients have dealings. See Maine's remarks on the role of the growing legal profession and better-trained judges in producing a diffusion of exactness and precision in the courts and a decay of discretionary powers of government. "Minute of 1st October, 1868," Minutes by Sir H. S. Maine 209, 211.

¹⁰⁹ Sir Ivor Jennings observing that the Constituent Assembly was dominated by lawyers, contends that "the lawyer-politician has . . . played a more important part in Indian politics than in the politics of any country in the world." This would be difficult to substantiate vis-a-vis the United States. Some Characteristics of the Indian Constitution (Oxford, 1953) 24. In 1953, lawyers comprised 26% of the Lok Sabha (Lower House) and 29% of the Rajya Sabha (Upper House). Cf. approximately 60% of the U. S. Congress (85th Cong.); 20% of the British House of Commons (1955); 14% of the French National Assembly (1951); 11% of the West German Bundestag (1957). Figures from John J. McCloy, "The Extra-curricular Lawyer," (lecture given at Washington and Lee University, April 18, 1958, mimeograph) 5-6.



carrying on public business in a way that is nationally intelligible and free of dependence on particular religious or local authority. It thus provides one requisite for organizing Indian society into a modern nation-state.

The formation of an independent Indian state provided a basis for further integration and consolidation of the modern legal system. With the coming of Independence, enclaves previously outside the legal system were integrated. A layer of constitutionalism was superimposed on the existing legal system and structure of government. The Constitution (1950) established India as a secular federal republic with a parliamentary system in the British style and a strong central government. The framers of the Constitution rejected the various proposals to construct a government along "indigenous" lines.¹¹⁰ The Constitution established powerful legislatures at the center and in the states. It also established a unified judiciary¹¹¹ covering the whole of India under a Supreme Court as a court of final appeal in all cases.¹¹²

The Constitution includes a bill of Fundamental Rights, enforceable by the judiciary,¹¹³ to which all governmental regulation and all laws in every part of

¹¹⁰ The proponents of an "indigenous" system of Government (of both orthodox and Gandhian persuasions) were severely disappointed with the Constitution, which did little to dismantle complex bureaucratic government, re-assert the virtues of village autonomy or express dedication to a life of purity in Hindu terms. The whole effort managed to deposit only three provisions in the Constitution, all in the chapter on Directive Principles: Prohibition, an item of uplift with religious overtones that had long absorbed social reformers (Art. 47); a commitment to laws abolishing cow-slaughter (Art. 48); and, most important, a promise to organize village panchayats and endow them with self-government (Art. 40).

¹¹¹ It has been impossible here to go into the question of separation of judicial and executive functions, a question which has vexed opinion in India since the early days of the British system. Suffice it to say that there has been an uneven but gradual development of separation of these functions. Complete separation is a Directive Principle of the present Indian Constitution (Art. 50). See P. Chandra Ray (ed.) The Separation of Judicial and Executive Functions in British India, (Calcutta, 1902); R. N. Gilchrist, The Separation of Executive and Judicial Functions: A study in the evolution of the Indian magistracy (Calcutta, 1923); Law Commission, Fourteenth Report, (Reform of Judicial Admin.) Vol. II, 850-63

¹¹² This includes finality on the interpretation of state law, unlike, e.g., the American Supreme Court. The predecessor "organic" law of India was the Government of India Act, 1935, which granted a wide degree of selfgovernment to the provinces of British India; a Federal Court was set up as a court of appeal on all cases involving the interpretation of the Act. Appeal to the Privy Council from judgments of the various High Courts was possible and often availed of, during the British rule, but its expense, delay and remoteness prevented it having the powerful unifying effect of the Supreme Court. Judgments of the Privy Council though in theory merely advisory, were generally followed throughout British India. On the jurisdiction of the Privy Council and Federal Court see M. P. Jain, Outlines of Indian Legal History (Delhi, 1952) Chapter XVII.

¹¹³ Constitution of India, Part III. Cf. Art. 32 and 226 on the wide judicial powers in this area.



India must conform. Government is enjoined by these provisions to be indifferent to particularistic and ascribed characteristics such as race, religion, caste, place of birth and sex in its dealings with citizens, whether as electors, employees or subjects.¹¹⁴ A wide range of private conduct, asserting precedence or imposing disabilities along such lines is forbidden, including venerable usages which had previously enjoyed religious and sometimes legal sanction.¹¹⁵ Governmental enforcement of rights based on caste position, heredity, vicinage, etc. is forbidden.¹¹⁶

To serve as a guide to the legislatures, the Constitution contains a set of non-justiciable "Directive Principles of State Policy"¹¹⁷ which call for the reconstruction of Indian society and government along the lines of a modern welfare state. Accordingly the central legislature and the legislatures of the several states established have released a flood of legislation aimed at economic development and social reform, extending governmental regulation to many areas of life previously immune from official control.¹¹⁸ Extensive regulation of landholding, religious endowments, caste practices and family law by central and state governments has supplanted governmental recognition of local rules of unofficial or parochial provenance.

The extension and consolidation of the "modern" features of the legal system can be observed in the treatment of two basic institutions of Hindu society -- the family and the caste. Among the Directive Principles is a commitment that the State "secure to the citizens a uniform civil code throughout the territory of India,"¹¹⁹ which contemplates the complete abandonment of the "personal law" system. Although no such unification of the laws of Hindus and Muslims has yet been undertaken, the Parliament in 1955-56 passed a series of Acts known collectively as the

¹¹⁴Id., cf. Art. 325 See e.g., State of Rajasthan v. Pratap Singh A.I.R. 1960 S.C. 1208; Sangbar Umar v. State A.I.R. 1952 Saur. 124; Nain Sukh Das v. State of U.P. A.I.R. 1963 S.C. 384. The major exceptions are the authorization of preferential treatment for the lowest castes and for tribal groups [see "Equality and 'Protective Discrimination' in India," XVI Rutgers Law Review 42-74 (1961)] and for women, Art. 15(3).

¹¹⁵Untouchability is forbidden (Art. 17) as is caste and religious discrimination in public facilities and accommodations, (Art. 15[2]); traditional systems of "forced labor" are outlawed (Art. 23[1]). See sources cited at note 122 infra.

¹¹⁶See e.g., Dasaratha Rama Rao v. State of Andhra Pradesh A.I.R. 1961 S.C. 564; Bhau Ram v. Baij Nath A.I.R. 1962 S.C. 1476; Aramugha Konar v. Narayana Asari A.I.R. 1958 Mad. 282. But while government does not protect religious honor as such, as a secular state it is limited in its interference with the autonomy of religious associations. See Arts. 25, 26; N. A. Subramaniam, "Freedom of Religion," 3 Journal of the Indian Law Institute 323-50 (1961).

¹¹⁷Constitution of India, Part IV.

¹¹⁸In the Constitution's first eight years, some six hundred Acts were passed by the Central Parliament (in addition to 89 Ordinances, 21 Regulations, and 62 Presidential Acts). During the four years 1953-56, the State Legislatures passed 2527 Acts, of which 275 dealt with land reform. Figures cited at Law Commission of India, Fourteenth Report (Reform of Judicial Administration) (2 Vols., Delhi, 1958) Vol. I, 30.

¹¹⁹Art. 44.



Hindu Code, which effect a wholesale and drastic reform of Hindu law.¹²⁰ Where earlier legislation introduced specific modifications into the framework of śāstric law, the Code entirely supplants the śāstra as the source of Hindu law. Hindu social arrangements are for the first time moved entirely within the ambit of legislative regulation; appeal to the entire śāstric tradition is dispensed with. The Code turns away from the śāstra by abandoning the notion of varna, indissoluble marriage, preference for the extended joint family, for inheritance by those who can confer spiritual benefit and for males, in favor of greater individualism and emphasis on the nuclear family, divorce and equality of varnas and sexes. Very few rules remain with a specifically religious foundation.

The Code marks the acceptance of Parliament as a kind of central legislative body to Hindus in matters of family and social life. The earlier notion that government had no mandate to or competence to re-design Hindu society is discarded. For the first time the bulk of the world's Hindus live under a single central authority with both the desire and the power to enforce changes in their social arrangements. It has been pointed out that throughout the history of Hinduism, no general and sweeping reforms were possible, just because of the absence of centralized governmental or ecclesiastical institutions.¹²¹ Reformers might persuade others and they might gain acceptance as a sect; but there was no way for them to win the power to enforce changes on others. They could supplement existing practice but they could not supplant it because there were no levers which could be grasped to accomplish across-the-board changes. Now it is possible to have changes enforced among all Hindus by a powerful central authority.

The Code subjects Hindus to a degree of uniformity unprecedented in Hindu legal history. Regional differences, the schools of commentators, differences according to varna, customs of locality, caste and family, many special statuses and estates, and (largely) distinctions of sex have all fallen by the wayside. Some narrow scope is allowed for custom, but for the first time a single set of rules is applicable to Hindus of every caste, sect and region.

Much the same might be said of constitutional provisions and legislative enactments regarding caste.¹²² Here, too, there is the assertion of broad regulative power by the government and curtailment of the autonomy of the component groups within Hinduism. This power is exercised to eliminate disparities of law and custom

¹²⁰For a detailed survey of the present post-Code law, see Derrett, Introduction to Modern Hindu Law (Bombay, 1963). For a comparison of the code law with anglo-Hindu law and with the śāstra, see the same author's Hindu Law Past and Present (Calcutta, 1957). For a concise estimate of the changes, see his "Statutory Amendments of the Personal Law of Hindus Since Indian Independence," 7 American Journal of Comparative Law 380 (1958). For the legislative history of the codification up to Independence, see H. L. Levy, The Hindu Code Bill in British India (unpublished M. A. Thesis, Department of Political Science, University of Chicago, 1961).

¹²¹K. M. Pannikar, Hindu Society at Cross Roads (3rd ed., Bombay, 1961) 72, 79 ff.

¹²²Untouchability (Offenses) Act. 1955; constitutional provisions cited note 115 supra. See "Caste Disabilities and Indian Federalism," 3 Journal of the Indian Law Institute 205-34 (1961); "Law and Caste in Modern India," 3 Asian Survey 544-59 (1963); "The Religious Aspects of Caste: A Legal View" in D. E. Smith, (ed.) Religion and Politics in South Asia (forthcoming).



and impose uniformity of precedures. Sastric notions and legal categories (varna, pollution) are discarded and "western" or "modern" categories substituted. In both cases we have emphasis on eradicating the barriers within Hinduism and promoting an integrated Hindu community -- and eventually a non-communal society. Finally, in both cases we have the western-educated elite using the law to impose its notions. As in many areas of Indian life, the law in regard to the family and caste represents not a response to the felt needs of its clientele or an accommodation of conflicting interests and pressures. Rather the law is the expression of the aspiration of the most articulate and "advanced" groups which hope to use its educational as well as its coercive powers to improve the unenlightened. Deliberate social change was not unknown before the coming of the British. On the contrary, Hindu law contained its own techniques for deliberate and obligatory innovation and these continue to be used into the early part of the British period. The revolutionary principle fostered by British rule was not the notion of deliberate social change, but the notion of the unit which might legitimately introduce such changes. The recent legislation visualizes a single national community -- or at least a community embracing all Hindus, transcending divisions of region, caste and sect.¹²³

Thus the present legal system provides a unifying element in India in a way that neither Hindu or Muslim law ever did. Muslim law never went deep enough; it was never applied to disputes among Hindus. Dharmaśāstra tolerated diversity, preferring unification by example, instruction and slow absorption rather than by imperative imposition. Change was piecemeal rather than comprehensive. In contrast, the new legal system provides machinery (and the ideology) for legislation to be enforced throughout the society. Such a system, along with mass communications, makes possible unprecedented consolidation and standardization of Hinduism as well as of Indian society generally.

Traditional Law in the Modern System

While the 'modern' legal system in India makes possible an unprecedented degree of certainty, uniformity and regularity of law, it brings with it dislocations and discomforts. Transplanted English law, though transformed in the process, stands in a very different relation to its clientele in its new setting. In England the common law was -- or became -- local, familiar and popular as well as general and

¹²³Only a short time ago the appropriateness of such comprehensive groupings as the source or object of reforms was not self-evident. In his 1886 presidential address to the second annual session of the Indian National Congress Dadhabhai Naoraji objected to the inclusion of social reform in the Congress program:

How can this gathering of all classes discuss the social reforms needed in each individual class? . . . Only the members of that class can effectively deal with the reforms therein needed. A National Congress must confine itself to questions in which the entire nation has a direct participation, and it must leave the adjustment of social reforms and other class questions to Class Congresses.

Quoted in B. R. Ambedkar, What Congress and Gandhi have done to the Untouchables (2d ed., Bombay, 1946) at 8-9. The social reformers were defeated and questions of social reform were excluded from Congress programs for the next thirty years.



official. In India it was -- and largely is -- only official.¹²⁴ There is a sizeable gap between the refinements of the lawyers' law on the one hand and popular notions of legality on the other. To many, perhaps most, Indians, the law remains distant and alien; the decisions of courts appear not as the applications of shared norms, but as the unfathomable caprices of authority. This "striking dichotomy between the court law and the popular law"¹²⁵ has been the theme of a continuing literature of criticism from civil servants, nationalists and students of Indian society, pointing out the unsuitability of British-style law in India.¹²⁶

It has been pointed out that the legal system is based on norms which are not shared by its clientele. The common law proceeds on the basis of equality before the law while indigenous dispute-settling finds it unthinkable to separate the parties from their statuses and relations. The common law gives a clear-cut "all or none" decision, while indigenous processes seek a face-saving solution agreeable to all parties; the common law deals only with a single isolated offense or transaction, while the indigenous system sees this as arbitrarily leaving out the underlying dispute of which this may be one aspect; the common law has seemingly arbitrary rules of evidence, which do not permit that which is well-known to be proved and that which is not can be proved;¹²⁷ the common law then seems abrupt and overly decisive, distant, expensive and arbitrary.¹²⁸

¹²⁴For an eloquent statement of the contrast, see the remarks of George Norton, then Advocate-general of Madras to an Indian audience in 1833:

...With the English . . . some acquaintance with the nature of their rights has become a very household knowledge, growing up with their growth to manhood and active life. But here, the dominion of the law is new . . . The natives . . . now first press forward to share . . . the rights and honours of free citizens. . . . But where shall they seek guides to point out to them the paths to this advancement? . . . which shall teach them that they do not possess common rights -- and what they are -- and how they are secured? They cannot find the springs of such knowledge in their own homes, issuing from those who have been bred up in the constant acquisition of it. They cannot attain it through the daily and mutual communication with each other, where all have equally to learn. They can learn but little . . . from their own books. . . . Still less can they draw instruction from those English laws and law treatises, which . . . must remain for the most part unintelligible. . . .

Notes of Lectures delivered at the College Hall of Madras on the System of Government and Administration of Justice in India (Madras, 1834) 230-31.

¹²⁵Derrett, AHLB 14. Re the analagous discrepancy in Japan, see Takayanagi, op. cit., esp. 39.

¹²⁶Cohn, "Some Notes on Law and Change in North India," op. cit., note 62; P. Moqn, Strangers in India (New York, 1945), esp. Chap. 2; Shore, op. cit. note 53, Vol. I, 236 ff.

¹²⁷On the unsuitability of the English law of evidence in India, see Maine, "The Theory of Evidence," reprinted in Village Communities at 323 ff. Maine notes that while first-hand evidence is better than hearsay in England, it is not necessarily so in India, 324. Cf. Shore, op. cit. note 53, Vol. II, 150-86 on problems of evidence and generally on the difficulties of establishing facts in Indian courts.

¹²⁸Cohn, op. cit., note 126. I am also indebted here to an unpublished manuscript by Lloyd and Susanne Rudolph.



The legal system has been blamed for the exacerbation of disputes, for encouraging a flood of interminable and wasteful litigation,¹²⁹ for encouraging perjury¹³⁰ and corruption. The law does not settle disputes (as it supposedly does in England) but merely provides another arena and new weapons for carrying on disputes, which it actually exacerbates by eroding traditional consensual dispute-settling methods.¹³¹

In the nationalist movement we find similar complaints issuing in a proposal for the restoration of indigenous justice. There is hostility to the courts as an agency of British control and the civil disobedience movement of 1920-22 included an attempt to boycott the official courts and set up truly Indian tribunals.¹³² The nationalist misgivings about the legal system are succinctly expressed by a Gandhian publicist in 1946, who accuses the British system of working havoc in India by replacing quick, cheap and efficient panchayat justice with expensive and slow courts which promote endless dishonesty and degrade public morality.¹³³ Existing law

¹²⁹Shore, op. cit. note 53, Vol. II, 187-215 attributes excessive litigation to the inadequacies of the British legal system and to British ignorance of Indian customs. Henry St. George Tucker, a Director of the East India Company complained in 1832 that "the natives of these provinces, to whom the duel is little known, repair to our courts as to the listed field, where they may give vent to all their malignant passions." Memorials of Indian Government (London, 1853) 218. For a contrary view see W. W. Hunter, Annals of Rural Bengal (7th ed., London, 1879) who finds that the supposed proneness to litigation of Indian peasants is due to the fact that rights in land are so widely spread (compared to England) and that the British courts offer a vent for "the pent-up litigation of several centuries." He finds it "only a healthy and most encouraging result of three-quarters of a century of conscientious government." For the first time Indians "are learning to enforce their rights." 341, 343.

¹³⁰See C. R. Baynes, A Plea for the Madras Judges . . . (Madras, 1853). "Evidence here and there [England] are virtually different things and must be tested in different ways. We have scarcely ever to consider established facts and to determine their . . . legal consequences. . . . [Rather] we are to guess amid the perjuries and forgeries of both sides at something which we may assume to be the facts and of which the legal consequences are apparent; we have in short to strike the balance of probabilities between lies of greater or less magnitude. . . ." 73-74. Cf. the observation of C. D. Field, A Bengal Civil Servant Judge that "in this country . . . it happens . . . not uncommonly that falsehood and fabrication are employed to support a just cause." The Law of Evidence (Calcutta, 1867) 49. See also Phillip Woodruff's The Men Who Ruled India: the Guardians (London, 1954) 52.

¹³¹Cf. Cohn, op. cit. note 62. Robert Carstairs, a Bengal district officer from 1874-1903 came to the conclusion that "nearly all [criminal cases] save a few of the graver cases, were episodes in some dispute not before the Court." The Little World of an Indian District Officer (London, 1912) 15.

¹³²See Gandhi's attacks on lawyers for enslaving Indians by cooperation with the British legal system, his plans for indigenous courts, etc. collected in The Law and the Lawyers S. B. Kher, (ed.) (Ahmedabad, 1962) Sections 4, 5. Earlier proposals for boycott of courts were made by B. G. Tilak and Sri Aurobindo in 1907. See de Bary, Sources of Indian Tradition (New York, 1958) 722, 727.

¹³³Shrimar Agarwal Narayan, A Gandhian Constitution for a Free India (Allahabad, 1946) 97, 100, 131.



is foreign and too complex; this complexity promotes "criminal mentality and crime."¹³⁴ In their place he would have panchayats dispense justice at the village level, eliminating the need for lawyers and complex laws.¹³⁵

While the "alien" character of the modern legal system must bear some responsibility for these discomforts, I would suggest that it is not only -- or even principally -- its foreign provenance that is responsible. To a considerable extent, they seem inherent in the process of the formation of a nationwide legal system of the modern type (and thus of a modern nation state). If the nationwide political power undertook to build a legal system on the basis of Hindu law or local customary law, it seems questionable whether such a system would appear less exotic to the villager. Any nationwide system means legal norms and procedures designed in urban centers to regulate transactions in villages. Such a system must be, to some extent at least, uniform, hierarchic, bureaucratic, rational, specialized, professional, transactional, amendable, and under political control.

While any nationwide system of law looks foreign to the villager, (or at least to those non-villagers who look at it through his eyes), the present Indian system seems quite indigenous to the nationally-oriented urban Indian. A recent Attorney General expresses this when he finds the present Indian legal system "unmistakably Indian in its outlook and operation."¹³⁶ Dealing with charges that the present system is alien and unsuitable and should be replaced by an indigenous system, a recent Law Commission pointed out that:

in its essentials even the ancient Hindu system comprised those features which every reasonably-minded person would acknowledge as the essential features of any system of judicial administration, whether British or other, such features as rules of pleading, manner in which complaints are to be drawn, devices to meet abuse of right to sue, rules of evidence, order in which litigation should proceed, exclusion of oral by documentary evidence, the rule that evidence should be direct, the rule that hearsay evidence should be excluded, the principle of burden of proof, the provision for appeal or review are common to the ancient and the present system. We can even hazard the view that had the ancient system been allowed to develop normally, it would have assumed a form not very different from the one that we follow today.¹³⁷

¹³⁴ While complex rules of procedure and evidence may make the law unintelligible to the villager, it may be that it is the simplicity of the substantive rules -- i.e., their failure to articulate the complex and multiple relations of village life, which makes them so remote and strange. Cf. Cohn, op. cit. note 62 at 91.

¹³⁵ Mr. Narayan concedes that there should be higher courts of a professional type, but does not indicate what effect their law would have on the panchayats. (It should be noted that Mr. Narayan has no hesitation in having government undertake the most thoroughgoing transformation of Indian life. "Socialist Pattern of Society," [1955] in M. Weiner, [ed.] Developing India [2 Vols. University of Chicago, 1961] Vol. II, 66 ff.)

¹³⁶ Setalvad, op. cit. note 46, 225.

¹³⁷ Law Commission of India, Fourteenth Report (Reform of Judicial Administration), (2 Vols. Delhi, 1958) Vol. I, 29-30.



Whether or not the Hindu law applied at the local level did have all these complexities, the Commission is surely correct in its insight that if this law were to be revived for the purpose of forming a nationwide legal system, dealing with the full range of activities in present-day India and insuring a modicum of certainty and uniformity, some complexities and technicalities on this order would have to be erected.

What, then, is the role of Hindu law in the Indian legal system today? The dharmaśāstra component is almost completely obliterated. It is the original source of various rules in the "personal law" fields, but the śāstra itself is no longer a living source of law; these rules are intermixed with rules from other sources and are administered in the common-law style, isolated from śāstric techniques of interpretation and procedure.¹³⁸ In other fields of law, śāstra is not used as a source of precedent, analogy or inspiration. As a procedural-technical system of law -- a corpus of norms, techniques and institutions -- it is no longer functioning. There seems to be little nostalgia to revive particular śāstric rules,¹³⁹ (which would in any event be administered in the common law style); the pleas for an indigenous system are for the directness, cheapness and simplicity of local law, not for the complexities of dharmaśāstra.

The local customary component of Hindu law is also a source of rules at a few isolated points, but it, too, has been abandoned as a living source of law. There is but one significant attempt to promote such indigenous law, by devolving certain judicial responsibilities to the local elective village panchayats.¹⁴⁰ These elective panchayats are intended to increase village initiative and participation in economic development and also to exercise certain judicial responsibilities in "petty" cases.¹⁴¹ But these panchayats, with their selection by popular election, fixed membership, decisions by majority rather than unanimity, provisions for record keeping, the compulsory execution of their decrees, provisions for appeal, to regular courts, their conformity to and application of statutory law, and their increased access to official and urban models of behavior are quite a different sort of body than the traditional panchayat.¹⁴² It has been pointed out that in their develop-

¹³⁸ There are some stylistic carry-overs from dharmaśāstra into Indian common law, e.g., the tendency of Indian courts to decide all the points in a case, even those unnecessary to a decision, seems to parallel the śāstric practice.

¹³⁹ Very considerable portions of śāstra, with their emphasis on graded inequality, would fail to meet present constitutional requirements -- and would hardly be likely to appeal to India's present rulers.

¹⁴⁰ Schemes for judicial panchayats have been attempted since at least the beginning of the 20th century. See the excellent survey of the Law Commission, op. cit. note 137, Vol. II, 874-925.

¹⁴¹ In some states these functions are separated; in others they are combined in the same body.

¹⁴² On the contrast of these new panchayats with traditional village panchayats, see R. H. Retzlaff, Village Government in India: A Case Study (London, 1962) 23 ff. See H. S. Luchinsky "Problems of Culture Change in the Indian Village," Human Organization, Vol. 22, 66-74 at 73. For a critical view of panchayats as dispute-settlers, see Robert S. Robins "India: Judicial Panchayats in Uttar Pradesh" American Journal of Comparative Law 11, 239-46 (1962). Of course the very selection of the village panchayat as the unit to have governmental support implies a great change from the traditional system in many places, where there were functioning caste tribunals in addition to or instead of village ones. The emphasis on the village panchayat represents an attempt to recreate an idealized version of the traditional society.



ment aspect, the panchayats tend to be channels for dissemination of official policies downward rather than for assertion of local interests as locally conceived.¹⁴³ It is unclear to what extent this will be the case with their judicial functions, too. Rather than a resurgence of legal law, they may effect a further displacement of local law by official law within the village.¹⁴⁴

It is suggested that judicial panchayats will tend to serve as agencies for the dissemination of official norms and procedures. For the traditional method of relating the authoritative "official" law to local customary law has definitely been supplanted. The Indian legal system is now equipped with machinery for bringing local law into line with national standards.¹⁴⁵ Once such a mechanism is present, local law can only survive by taking on the character of "modern" law -- it must become certain, definite, "consistant," obligatory rather than discretionary or circumstantial. Every legal system faces the problem of bridging the gap between its most authoritative and technically elaborate literary products at the "upper" end of the system and the varying patterns of local practice at the "lower" end. It must decide on allowable leeways -- how much localism to accommodate, how to deflect local to general standards. Hindu law solved these problems by willingly accommodating almost unlimited localism; it was willing to rely on acceptance and absorption through persuasion and example. These methods are too slow and irregular to appeal to a ruling group which aspires to transform the society radically and build a powerful and unified nation. Even where specifically Hindu norms are made the basis of legislation -- e.g., in prohibition and anti-cow slaughter laws, these norms are not implemented by the old techniques. Enforcing these matters by legislation, courts and police stands in striking contrast to their gradual adoption by various groups in the society; such change still takes place, but it operates outside the legal system. But these methods of persuasion have not disappeared. While the harsher British methods have displaced them from the legal system itself, they persist alongside it in the form or propaganda, education and the widespread tendency to imitate urban and official ways.¹⁴⁶

ideal not only based on a picture of the older society which emphasized harmony and unity, but infused with the designers' own hostility toward "communal" units.

¹⁴³There is an extensive literature on the difficulties of the panchayat as administrative unit. See Hugh Tinker, "The Village in the Framework of Development" in Braibanti and Spengler, (eds.), Administration and Economic Development in India (Durham, N.C., 1963); Reinhard Bendix, "Public Authority in a Developing Political Community: the Case of India," IV Archives Europeanes de Sociologie (1963).

¹⁴⁴Cf. the experience with village courts in Ceylon where after seventy years of experiment, "the Government finally turned its back on village courts which were outside the system of regular courts in favor of 'ordinary Courts of law -- the most rudimentary form of Courts, but quite definitely a Court of law -- the first rung in a ladder.'" R. K. W. Goonesekere, "Eclipse of the Village Court," The Ceylon Journal of Historical and Social Studies, Vol. I, 138-54 at 154 (1958).

¹⁴⁵It should be noted that this machinery is more insistent in India than in, e.g., the United States where juries and locally elected judges introduce a check on uniformity and provide an enclave for localism.

¹⁴⁶But these media have themselves been transformed by political unity and modernization. Marriott describes the replacement of the "tangled networks of medieval Indian civilization" with channels of cultural transmission of a "radial or pyramidal form" based on centralized institutions in a few great urban centers. "Changing Channels of Cultural Transmission in Indian Civilization," Verne F. Ray (ed.), Intermediate Societies, Social Mobility, and Communication: Proceedings of the 1959 Annual Spring Meeting of the American Ethnological Society, 66-72 at 72.



But the demise of traditional law does not mean the demise of traditional society. Traditional notions of legality and methods of change still persist at a sub-legal level -- e.g., in the area of activities protected by the doctrine of "caste autonomy" and in the form of accepted deviance, and in arrangements to evade or ignore the law. The modern legal system may provide new possibilities for operating within "traditional" society. Traditional society is not passively regulated by the modern system; it uses the system for its own ends. Traditional interests and groupings now find expression in litigation, in pressure-group activity, through voluntary organization. Morris-Jones speaks of two contrasting political "idioms" or "styles" in contemporary India: the "modern" idiom of national politics with its plans and policies; and the "traditional" idiom of social status, customary respect, communal ties, ambitions and obligations.¹⁴⁷ He notes that "Indian political life becomes explicit and self-conscious only through the "Western" [modern] idiom. . . . But this does not prevent actual behavior from following a different path."¹⁴⁸ Similarly, all contact with the legal system involves the translation of traditional interests and concerns into "modern" terms in order to get legal effectiveness. E.g., at the touch of the official law, a caste's prerogatives become the constitutionally protected rights of a religious denomination;¹⁴⁹ a lower caste's ambitions become its constitutional right to equality; poverty can be made to devolve along "traditional" lines and land-reforms can be frustrated by transactions in good legal form. Traditional interests and expectations are translated into suitable legal garb, into nationally-intelligible terms. But the process of translation opens new possibilities for affiliation and alignment, new modes of action. If we regard tradition not as a stationary point, a way of remaining unchanged, but as a method of introducing and legitimating change, we can say that the modern legal system has displaced traditional methods within the legal system itself while it has supplemented them outside it.

India has what we might call a dualistic or colonial-style legal system -- one in which the official law embodies norms and procedures congenial to the governing classes and remote from the attitudes and concerns of its clientele. While such systems are typical of areas in which a colonizing power superimposes uniform law over a population governed by a diversity of local traditions, such legal colonization may occur from within as well as from without, as in Turkey,¹⁵⁰ Japan,¹⁵¹ and in India since the departure of the British. The "colonial" legal situation prevails wherever there is unresolved tension between national and local, formal and popular, law.¹⁵² In a relatively homogenous society the law can be visualized

¹⁴⁷W. H. Morris-Jones, "India's Political Idioms," C. H. Phillips (ed.), Politics and Society in India (London, 1962) 133-54.

¹⁴⁸Id., at 142.

¹⁴⁹See e.g., Sri Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255.

¹⁵⁰See the papers on "The Reception of Foreign Law in Turkey," International Social Science Bulletin Vol. 9, 7-81 (1957).

¹⁵¹See K. Takayanagi, "A Century of Innovation: the Development of Japanese Law, 1868-1961," A. von Mehren (ed.), Law in Japan: The Legal Order in a Changing Society (Cambridge, Mass., 1963).

¹⁵²The colonial legal situation then stands midway between those systems where official law is reflective of, and well integrated with, popular law because it has been precipitated out of that law (or because it has completely absorbed and digested local law); and those where it is reflective of and well integrated with, folkways because no remote official law has ever differentiated itself institutionally from folk or popular law.



as the expression of widely shared social norms, in a heterogenous society (differentiated horizontally by culture, or vertically by caste or class) the law expresses not primarily the aspirations and concerns of "the society" but those of the groups that promulgate, formulate, and apply the law.¹⁵³ A gap between the "official" law and popular or local law is probably typical of most large political entities with intensive social differentiation. To some extent this "colonial" legal situation obtains in most "modern" societies.¹⁵⁴ But it is present with special force in the so-called new states. In the 19th and early 20th centuries, the poorer parts of the earth were the scene of a reception of foreign law unprecedented in scope (even by the reception of Roman law in medieval Europe). The incorporation of large blocs of common law and civil law in the 19th century has been followed by the reception of new constitutional models in the 20th century and by a post-Independence wave of reform and rationalization. This process of borrowing, consolidation and modernization of national legal systems seems to involve certain common trends: application of laws over wider spacial, ethnic and class areas; replacement of personal by territorial law; the breakdown of corporate responsibility and growth of individual right; increasing generality and abstraction; greater specialization and professionalization, secularization, bureaucratization, replacement of moral intuition by technical expertise. In almost all of the newer countries the legal system is comprised of these 'modern' elements in uneven mixtures with traditional ones and the discrepancy between the different components of the legal system is strongly felt. This multi-layered legal situation involves common processes of the displacement of local by official law and it also is accompanied by common discomforts.¹⁵⁵

¹⁵³This applies readily to legislators in India and also to judges. If professional judges are usually an insulated and detached group with their own peculiar perspective on society; this detachment and separation are particularly intense in India. On the remoteness of the judiciary and limited communication with those effected due to differences in language, and manners, etc. see Rajah Rammohun Roy, Exposition of the Practical Operation of the Judicial and Revenue Systems of India (London, 1832) 4-5. Cohn, op. cit. note 104 at 186 suggests that as compared with other officials, judges as a group stood outside Indian society and its values and tended to know little of the districts. This tradition of detachment continues today and is promoted by the deliberate insulation of judges from public and political pressures.

¹⁵⁴Misgivings about the remoteness of official law are, of course, not confined to the newer states. See e.g., the recent remarks of J. B. Priestly on English law

... the Law on its higher levels of wiggery and robbery, well above magistrates' courts and probation officers' rooms, may uphold tradition, may represent the judicial wisdom of centuries, may preserve our ancient liberties, but most of us no longer feel it is part of the life we are living here and now. It may be Her Majesty's but it isn't ours. "Wigs and Robes" New Statesman, Aug. 17, 1962, 196-97.

Cf. John Dewey, The Public and Its Problems (Chicago, 1946) 116-17. Maine (Village Communities, 59-60) remarks on the relative remoteness of English law (as compared to continental law) from daily life and the extent to which it is regarded as the exclusive possession of professionals.

¹⁵⁵Cf. the complaints that the law is foreign, judges don't understand our customs, expense, delay, unnecessarily complicated procedure, etc., in medieval Germany at the time of the reception of Roman law and its application by professional courts. Monroe Smith, op. cit. note 4 at 35-6.



A certain "irreversibility" in this process of forming a modern legal system, even where it is based upon foreign sources (at least so long as a unified political power retains control of the law) seems indicated by other instances of the reception of complex law based upon "foreign" sources as in the reception of Roman law in Western Europe or the massive borrowing of civil law in 19th century Japan. This is confirmed by the very limited success of revivalist movements. Attempts to purify and reconstruct Irish law¹⁵⁶ fared no better than present attempts in Pakistan¹⁵⁷ and Israel¹⁵⁸ which have so far not succeeded in bringing about any fundamental changes in their respective legal systems. In Ireland, Israel and Pakistan, there is if anything more "common law" in the broad sense, i.e., law of the modern type, than before independence. In India where the proponents of indigenous law are less attached to dharmaśāstra than nostalgic for the "simplicity" of local customary law -- and where they tend to be persons who find detailed consideration of the law uncongenial -- any change in this direction is even more unlikely.

One may compare the fate of British law with that of the English language as a medium for public business and civil life. The colonial languages appear to recede from their former pre-eminence, while the tide of law continues to advance. Strangely, the law seems more separable from its origin, relatively easy to borrow and hard to discard. Bryce finds in the spread of Roman and British Law "a remarkable instance of the tendency of strong types to supplant and extinguish weak types in the domain of social development."¹⁵⁹ But what made British law a "strong type" was not the superiority of the norms it embodied or the elegance with which the system was elaborated.¹⁶⁰ It was the fact that British law included techniques for the ruthless replacement of local law by official law -- it accomplished its own imposition half inadvertently. And this imposition seems enduring in a way that language is not. An official language does not become a household language; each generation must go through the painful process of estrangement anew. The official language does not necessarily gain at the expense of the household languages; on the contrary, we find in India an enrichment and development of indigenous languages during British rule. However, official law of the "modern" type does not promote the enrichment and development of indigenous legal systems: it tolerates no rivals, dissolves away that which cannot be transformed into "modern" law and absorbs the remainder; it creates a numerous class of professionals who form the connecting links of the nation-state and a vast array of vested rights and defined expectations which disincline those holding them to support drastic changes.

What, then, can be said about the integrity of a civilization where a major intellectual and institutional complex has been replaced by one largely of foreign origin? Dharmaśāstra, by all accounts a major element of Indian civilization, is today all but obliterated. Perhaps many of its norms and concerns will find their way into the new system, but as a procedural-technical system of law, it is no longer functioning. In a sense, though, the new system is Indian: it is a unique system, peculiarly articulated to many of the interests and problems of modern India; and it is a new kind of unifying network through which various aspects of the civilization may find new expression.

¹⁵⁶See Frances Moran, "The Republic of Ireland," in A. L. Goodhard (ed.), The Migration of the Common Law (London, 1960) 31-35. (It was provided in 1919 that "no legal text-book published in Great Britain shall be cited to any Court." Cited at p. 33.) Cf. Takayanagi, op. cit. note 151, esp. 31.

¹⁵⁷See Abula'la Maududi, Islamic Law and Constitution (2d ed., Lahore, 1960) esp. Part I. But cf. N. J. Coulson, "Islamic Family Law: Progress in Pakistan," in Anderson (ed.), op. cit. note 39, 240-257.

¹⁵⁸K. Kahana, The Case for Jewish Civil Law in the Jewish State (London, 1960). Cf. H. Cohn, "The Spirit of Israel Law," International Lawyers Conference in Israel (Jerusalem, 1958).

¹⁵⁹Bryce op. cit. note 1 at 122.

¹⁶⁰It should be noted that unlike the civil law which spread widely by voluntary adoption, common law spread only by settlement or political dominion.



Errata

<u>Page</u>	<u>Paragraph</u>	<u>Note</u>	<u>Line</u>	<u>Reads</u>	<u>Should Read</u>
2	4		3	predable	predictable
6		28	1	dispute-settline	dispute-settling
8	3		5	ddalings	dealings
8	3		6	cast	case
11		53	3		See the examples referred to in <u>Note 61, infra. Cf. the observa-</u> <u>tions of Frederick John Shore,</u> that in fact, etc.
12	3		9	rearsome	fearsome
"		57	3	Sedtion	Section
14		66	1		Derrett attributes this <u>view</u> etc.
"		"	4		<u>Cf.</u> his observation that etc.
"		70	5	with	of
16		83	2 & 3	"Customs etc.	<u>Customs and Customary Law in</u> <u>British India,</u>
17		86	3	state	statute
22		114	2	Sangbar	Sanghar
"		"	3	1963	1953
28	3		11	qre	are
"		142	2		delete See
"		"	3 & 4		<u>Human Organization</u>
29		142	1	emphasized	emphasizes
30	1		19	poverty	property
32		156	1	Goodhard	Goodhart



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